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REPORTS OF CASES
DECIDED IN THE
SUPREME COURT
OF THE
STATE OF NORTH DAKOTA,

February 8, 1916 to April 11, 1916.

H. A. LIBBY
REPORTER

VOLUME 33

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FOR THE STATE OF NORTH DAKOTA.

JAN 23 1917

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THESE REPORTS.**

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HON. A. M. CHRISTIANSON, Judge.

HON. EDWARD T. BURKE, Judge.

HON. EVAN B. GOSS, Judge.

HON. ANDREW A. BRUCE, Judge.

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▼

CONSTITUTION OF NORTH DAKOTA.

SEC. 101. Where a judgment or decree is reversed or confirmed by the Supreme Court, every point fairly arising upon the record of the case shall be considered and decided, and the reason therefor shall be concisely stated in writing, signed by the judges concurring, filed in the office of the Clerk of the Supreme Court, and preserved with a record of the case. Any judge dissenting therefrom may give the reasons for his dissent in writing over his signature.

SEC. 102. It shall be the duty of the court to prepare a syllabus of the points adjudicated in each case, which shall be concurred in by a majority of the judges thereof, and it shall be prefixed to the published reports of the case.

vi

COUNTY COURTS.

In general, the county courts (so designated by the Constitution) are the same as the probate courts of other states.

CONSTITUTIONAL PROVISIONS.

SEC. 110. There shall be established in each county a county court, which shall be a court of record open at all times and holden by one judge, elected by the electors of the county, and whose term of office shall be two years.

SEC. 111. The county court shall have exclusive original jurisdiction in probate and testamentary matters, the appointment of administrators and guardians, the settlement of the accounts of executors, administrators and guardians, the sale of lands by executors, administrators, and guardians, and such other probate jurisdiction as may be conferred by law; provided, that whenever the voters of any county having a population of two thousand or over shall decide by a majority vote that they desire the jurisdiction of said court increased above that limited by this Constitution, then said county court shall have concurrent jurisdiction with the district courts in all civil actions where the amount in controversy does not exceed one thousand dollars, and in all criminal actions below the grade of felony, and in case it is decided by the voters of any county to so increase the jurisdiction of said county court, the jurisdiction in cases of misdemeanors arising under state laws which may have been conferred upon police magistrates shall cease. The qualifications of the judge of the county court in counties where the jurisdiction of said court shall have been increased shall be the same as those of the district judge, except that he shall be a resident of the county at the time of his election, and said county judge shall receive such salary for his services as may be provided by law. In case the voters of any county decide to increase the

jurisdiction of said county courts, then such jurisdiction as thus increased shall remain until otherwise provided by law.

STATUTORY PROVISIONS.

Increased Jurisdiction: Procedure. The rules of practice obtaining in county courts having increased jurisdiction are substantially the same as in the district courts of the state.

Appeals. Appeals from the decisions and judgments of such county courts may be taken direct to the supreme court.

The following named counties now have increased jurisdiction: Benson; Bowman; Cass; Dickey; La Moure; Ransom; Renville; Stutsman; Ward; Wells.

CASES REPORTED IN THIS VOLUME.

	Page		Page
A			
Aamoth v. Hunter	582	First Nat. Bank, Northern Trust Co.	
Anderson, Westlake v.	326	v.	1
B			
Bank of Mowbray v. Kelland	382	Foisie, McLean v.	646
Barkley v. Quick	124	Fox, Northwestern Trust Co. v. ..	482
Bergen Twp. v. Nelson County	247	Freerks v. Nurnberg	587
Betzina, Grangaard v.	267	G	
Board of Education v. Nelson	462	Garbush v. Firey	154
Boelter v. Crist	331	Gearey, Fargo v.	64
Booren v. McWilliams	339	Goehring, Rott v.	413
Branthover v. Monarch Elev. Co. ..	454	Gold-Stabeck Loan & C. Co. v. Kin-	
Browkowski, Houghlum v.	622	ney	495
Buchanan v. Occident Elev. Co.	346	Grangaard v. Betzina	267
Buttz v. James	162	H	
C.			
Chaffee Bros. Co. v. Powers Elev. Co.	550	Halverson v. Lasell	613
Clemans, Elliott v.	609	Harney, Orfield v.	568
Collard, Merchants Nat. Bank v. ..	556	Houghlum v. Browkowski	622
Crist, Boelter v.	331	Hunter, Aamoth v.	582
D			
Dill, Peterson v.	407	Hurley Farmers Elev. Co., State	
Drinkwater v. Pake	190	Bank v.	272
E			
Elliott v. Clemans	609	J	
Elton v. Lamb	388	Jackson v. Jamestown	596
Ennis v. Retail Merchants Asso. M.		James, Buttz v.	162
F. Ins. Co.	20	Jamestown, Jackson v.	596
Erickson v. Wiper	193	Johnson, Rohan v.	179
F			
Fargo v. Gearey	64	K	
Farmers' & M. Bank v. Mann	135	Kelland, Bank of Mowbray v.	382
Firey, Garbush v.	154	Kinney, Gold-Stabeck Loan & C. Co.	
G			
		v.	495
		Knapp v. Minneapolis, St. P. & S.	
		Ste. M. R. Co.	291
		Koloen v. Pilot Mound Twp.	529
		Kurtz v. Paulson	400
L			
		Lamb, Elton v.	388

	Page
Lasell, Halverson v.	613
Lee v. St. Anthony & D. Elev. Co.	567
Leech, State ex rel. Miller v.	513
Lovin, Novak v.	424

M

McLean v. Foisie	646
McWilliams, Booren v.	339
Mann, Farmers' & M. Bank v.	135
Mattson, Person v.	49
Merchants Nat. Bank v. Collard ..	556
Miller, State v.	39
Minneapolis, St. P. & S. Ste. M. R. Co., Knapp v.	291
Mischel, Stark County v.	432
Monarch Elev. Co., Branthover v. ..	454
Moore v. Tomlinson	638
Morris v. Occident Elev. Co.	447

N

Nelson, Board of Education v.	462
Nelson County, Bergen Twp. v.	247
Northern Trust Co. v. First Nat. Bank	1
Northwestern Trust Co. v. Fox ..	482
Novak v. Lovin	424
Nurnberg, Freerks v.	587

O

Occident Elev. Co., Buchanan v. ..	346
Occident Elev. Co., Morris v.	447
Orfield v. Harney	568

P

Page v. Smith	369
Pake, Drinkwater v.	190
Pathman v. Williams	365
Paulson, Kurtz v.	400
Paulson v. Reeds	141
Paulson v. Sorenson	488
Person v. Mattson	49
Peterson v. Dill	407
Pilot Mound Twp., Koloen v.	529
Powers Elev. Co., Chaffee Bros. Co. v.	550
Powers Elev. Co. v. Stolz	628

Q

Quick, Barkley v.	124
------------------------	-----

R

	Page
Reeds, Paulson v.	141
Retail Merchants Asso. M. F. Ins. Co., Ennis v.	20
Rohan v. Johnson	179
Rosenwater v. Selleseth	254
Rott v. Goehring	413

S

St. Anthony & D. Elev. Co., Lee v.	567
Sarles v. Scandinavian American Bank & N. W. T. Co.	40
Scandinavian American Bank & N. W. T. Co., Sarles v.	40
School Dist. No. 94 v. Special School Dist. No. 33	353
Scofield v. Wilcox	239
Selleseth, Rosenwater v.	254
Smith, Page v.	369
Sorenson, Paulson v.	488
Special School Dist. No. 33, School Dist. No. 94 v.	353
Stark County v. Mischel	432
Starke v. Stewart	359
State v. Miller	39
State v. Stevens	540
State ex rel. Miller v. Leech	513
State ex rel. Linde v. Taylor	76
State Bank v. Hurley Farmers Elev. Co.	272
State Bank of Dresden v. Wadsworth	649
Stevens, State v.	540
Stewart, Starke v.	359
Stolz, Powers Elev. Co. v.	628
Sult, Tolerton & W. Co. v.	283

T

Taylor, State ex rel. Linde v.	76
Tolerton & W. Co. v. Sult	283
Tomlinson, Moores v.	638

W

Wadsworth, State Bank of Dresden v.	649
Westlake v. Anderson	326
Wilcox, Scofield v.	239
Williams, Pathman v.	365
Wiper, Erickson v.	193

TABLE OF DAKOTA CASES CITED IN OPINIONS.

	Page
Brown v. Forbes	288
Nichols, S. & Co. v. Barnes	555
Parliman v. Young	211
Wilson v. Russell	241

TABLE OF NORTH DAKOTA CASES CITED IN OPINIONS.

A

		Page
Alstad v. Sim	15 N. D. 629	252
Alsterberg v. Bennett	14 N. D. 596	234, 238
American Case & Register Co. v. Walton & D. Co.	22 N. D. 187	642
American Nat. Bank v. Lundy	21 N. D. 167	587
Anderson v. Johnson	16 N. D. 174	152, 271
Angell v. Egger	6 N. D. 391	281
Annis v. Burnham	15 N. D. 577	287
Aronson v. Oppegard	16 N. D. 595	281

B

Beddow v. Flage	22 N. D. 54	580
Bennett v. Glaspell	15 N. D. 239	266
Bergen Twp. v. Nelson County	33 N. D. 247	92
Bergh v. John Wyman Farm Land & Loan Co.	30 N. D. 158	565
Bidgood v. Monarch Elevator Co.	9 N. D. 627	279
Borden v. McNamara	20 N. D. 225	211
Bowman v. Eppinger	1 N. D. 21	350
Brown v. Chicago, M. & St. P. R. Co.	12 N. D. 61	301
Brown v. Skotland	12 N. D. 445	636
Buchanan v. Occident Elevator Co.	33 N. D. 346	618
Burleigh County v. Rhud	23 N. D. 362	537, 539

C

Capital Bank v. School Dist.	1 N. D. 479	17
Christianson v. Farmers' Warehouse Asso.	5 N. D. 438	566
Citizens' Nat. Bank v. Branden	19 N. D. 489	141
Colby v. McDermont	6 N. D. 495	350
Coleman v. Fargo	8 N. D. 69	93
Corliss, Ex parte	16 N. D. 470	110

D

Dahlund v. Lorentzen	30 N. D. 275	462
Daisy Roller Mills v. Ward	6 N. D. 317	562
Davis v. Jacobson	13 N. D. 430	222, 223, 225
Dean v. Dimmick	18 N. D. 397	522
Dickinson v. White	25 N. D. 523	20
Ditton v. Purcell	21 N. D. 648	262
Dowagiac Mfg. Co. v. Hellekson	13 N. D. 257	565

xiv TABLE OF NORTH DAKOTA CASES CITED IN OPINIONS.

		Page
Drinkwater v. Pake	33 N. D. 100	643
D. S. B. Johnston Land Co. v. Mitchell	29 N. D. 510	374, 376

E

Edwards v. Cass County	23 N. D. 555	75
Ellestad v. Northwestern Elevator Co.	6 N. D. 88	555
Ellison v. La Moure	30 N. D. 43	252
Ely v. Rosholt	11 N. D. 559	102
Englert v. Dale	25 N. D. 587	566
Engstad v. Dinnie	8 N. D. 1	17
Ennis v. Retail Merchants' Asso. Mut. F. Ins. Co.	33 N. D. 20	405
Erickson v. Cass County	11 N. D. 494	92, 251, 252
Erickson v. Elliott	17 N. D. 389	642

F

First Nat. Bank v. Kelly	30 N. D. 84	207
First Nat. Bank v. Laughlin	4 N. D. 391	225, 405, 587
First Nat. Bank v. Red River Valley Nat. Bank	9 N. D. 319	350
Fluegel v. Henschel	7 N. D. 276	562
Force v. Peterson Mach. Co.	17 N. D. 220	281
Fox v. Walley	13 N. D. 610	17, 437
French v. State Farmers' Mut. Hail Ins. Co.	29 N. D. 426	405
Fulton v. Cretian	17 N. D. 335	271

G

Gjerstadengen v. Hartzell	9 N. D. 268	212
Goose River Bank v. Willow Lake School Twp.	1 N. D. 26	17
Gorthy v. Jarvis	15 N. D. 509	628
Greenleaf v. Minneapolis, St. P. & S. Ste. M. R. Co.	30 N. D. 112	185, 186, 189
		594
Grove v. Great Northern Loan Co.	17 N. D. 352	510
Grove v. Morris	31 N. D. 8	157, 158, 160

H

Hackney v. Elliott	23 N. D. 373	252
Hanson v. Skogman	14 N. D. 445	281
Harris v. Van Vranken	32 N. D. 238	146
Hart-Parr Co. v. Finley	31 N. D. 130	578
Haugen v. Skjervheim	13 N. D. 616	212
Hayes v. Cooley	13 N. D. 204	492
Heard v. Holbrook	21 N. D. 348	157
Hebden v. Bina	17 N. D. 235	374
Helgebye v. Dammen	13 N. D. 172	236
Hermann v. Minnesota Elevator Co.	27 N. D. 235	279
Higbee v. Daeley	15 N. D. 339	374
Higgins v. Rued	30 N. D. 551	158, 160
Horgan v. Russell	24 N. D. 490	412
Hosmer v. Sheldon School Dist.	4 N. D. 197	17
Hunter v. Coe	12 N. D. 505	412

I

Illstad v. Anderson	2 N. D. 167	192, 317
---------------------------	-------------	----------

TABLE OF NORTH DAKOTA CASES CITED IN OPINIONS.

xv

J

		Page
Jasper v. Hazen	4 N. D. 1	565
Johns v. Ruff	12 N. D. 74	36
Johnson v. Fargo	15 N. D. 525	93
Johnson v. Rutherford	28 N. D. 87	398
Johnson v. Soliday	19 N. D. 463	635

K

Kaeppler, Re	7 N. D. 307	159
Kennedy v. Dennstadt	31 N. D. 422	461
Kermott v. Bagley	19 N. D. 345	97
King v. Hanson	13 N. D. 85	160, 419
Kuhnert v. Conrad	6 N. D. 215	236

L

Laffy v. Gordon	15 N. D. 282	429
Landis Mach. Co. v. Konantz Saddlery Co.	17 N. D. 310	350
Larson v. Walker	17 N. D. 247	250
Lee v. Imperial Elevator Co.	34 N. D. 1	567
Leonard v. Fleming	13 N. D. 629	172
L. J. Owens Co. v. Doughty	16 N. D. 10	262
Lockren v. Ruston	9 N. D. 43	564
Lokken v. Miller	9 N. D. 513	364
Louva v. Worden	30 N. D. 401	146
Lovejoy v. Merchants' State Bank	5 N. D. 623	281
Lynn v. Seby	29 N. D. 420	492

M

McBride v. Wallace	17 N. D. 495	350
McCormick Harvester Mach. Co. v. Caldwell	15 N. D. 132	643
McDonald v. Finseth	32 N. D. 400	209
McGregor v. Great Northern R. Co.	31 N. D. 471	352, 621
McKenzie v. Bismarck Water Co.	6 N. D. 361	636
Maclaren v. Kramer	26 N. D. 244	35
Madson v. Rutten	16 N. D. 281	350
Malmstad v. McHenry Teleph. Co.	29 N. D. 21	298
Martin v. Hawthorn	3 N. D. 412	628
Martin v. Hawthorne	5 N. D. 66	628
Martin v. Tyler	4 N. D. 278	111
Mears v. Somers Land Co.	18 N. D. 384	377
Minneapolis & N. E. Co. v. Traill County	9 N. D. 213	107
Minnesota Thresher Mfg. Co. v. Lincoln	4 N. D. 410	225
Mitchell v. Knudtson Land Co.	19 N. D. 737	576, 578, 580
Mitchell v. Monarch Elevator Co.	15 N. D. 495	458, 459
Moeller v. Rugby	30 N. D. 438	607
Moore v. Booker	4 N. D. 543	208
Moore v. Weston	13 N. D. 574	430
Morris v. Minneapolis, St. P. & S. Ste. M. R. Co.	32 N. D. 366	225, 350, 595
Mott v. Holbrook	28 N. D. 251	173
Mulroy v. Jacobson	24 N. D. 354	289
Murphy v. Casselman	24 N. D. 336	512

N

Nash v. Northwest Land Co.	15 N. D. 566	378
Nearing v. Coop	6 N. D. 345	635

		Page
Nelson v. Grondahl	13 N. D. 363	39
Newell v. Wagness	1 N. D. 62	562
North Dakota L. Co. v. Haney	23 N. D. 504	635
Northern P. R. Co. v. Richland County	28 N. D. 172	95
Northern Trust Co. v. First Nat. Bank	25 N. D. 74	9

O

O'Laughlin v. Carlson	30 N. D. 213	85, 86, 111
Oswald v. Moran	9 N. D. 170	369

P

Parker v. First Nat. Bank	3 N. D. 87	628
Paulson v. Ward	4 N. D. 100	562, 563
Pease v. Magill	17 N. D. 166	350
Picton v. Cass County	13 N. D. 242	106, 330
Pillsbury v. J. B. Streeter, Jr. Co.	15 N. D. 182	580
Power v. Larabee	2 N. D. 141	526
Purcell v. St. Paul F. & M. Ins. Co.	5 N. D. 100	442, 446
Pyke v. Jamestown	15 N. D. 157	93

R

Raymond v. Edelbrock	15 N. D. 231	263
Ricks v. Bergsvendsen	8 N. D. 578	160
Roberts v. Roberts	10 N. D. 535	236

S

Salemonson v. Thompson	13 N. D. 182	562
Salzer v. Claffin	16 N. D. 601	635
Satterlund v. Beal	12 N. D. 123	364
Saunders v. Harris	24 N. D. 236	369
School Dist. v. King	20 N. D. 614	111
School Dist. v. Thompson	27 N. D. 459	356
Schuyler v. Wheelon	17 N. D. 161	204
Scott v. Northwestern Port Huron Co.	17 N. D. 91	642
Second Nat. Bank v. First Nat. Bank	8 N. D. 53	364
Semple v. Burke	26 N. D. 201	565
Sifton v. Sifton	5 N. D. 187	32
Sneve v. Schwartz	25 N. D. 287	263
Soliah v. Cormack	17 N. D. 393	251, 528
Sonnesyn v. Akin	14 N. D. 248	262
Starke v. Stewart	23 N. D. 359	452
State v. Gerhart	13 N. D. 663	222
State v. Gordon	32 N. D. 31	345
State v. Hazlet	16 N. D. 441	648
State v. Kent	5 N. D. 521	223
State v. Knudson	21 N. D. 562	225
State v. McNulty	7 N. D. 169	102
State v. Moeller	24 N. D. 165	224
State v. Olson	26 N. D. 304	120
State v. Pancoast. See State v. Kent.		
State v. Scholfield	13 N. D. 664	222
State v. Stevens	19 N. D. 249	102
State ex rel. Hagen v. Anderson	22 N. D. 65	107
State ex rel. Standish v. Boucher	3 N. D. 389	86
State ex rel. Rusk v. Budge	15 N. D. 205	529

TABLE OF NORTH DAKOTA CASES CITED IN OPINIONS.

xvii

State ex rel. Johnson v. Clark	21 N. D. 517	111
State ex rel. McClory v. Donovan	10 N. D. 203	102
State ex rel. Steel v. Fabrick	17 N. D. 532	83
State ex rel. Dorgan v. Fisk	15 N. D. 219	92, 251
State ex rel. Diebold Safe & L. Co. v. Getchell	3 N. D. 243	17
State ex rel. Lenhart v. Hanna	28 N. D. 583	104
State ex rel. Olson v. Jorgenson	29 N. D. 173	109
State ex rel. McCue v. Lewis	18 N. D. 125	110, 113
State ex rel. Trimble v. Minneapolis, St. P. & S. Ste. M. R. Co.	28 N. D. 621	565
State ex rel. Goodwin v. Nelson County	1 N. D. 88	117
State ex rel. Miller v. Taylor	27 N. D. 77	87, 98
State ex rel. Goodsill v. Woodmansee	1 N. D. 246	120
State Finance Co. v. Beck	15 N. D. 374	376
Stimson v. Stimson	30 N. D. 78	250
Summerville v. Sorrenson	23 N. D. 460	241

T

Tetrault v. O'Connor	8 N. D. 15	350
Thompson v. Cunningham	6 N. D. 426	225
Tolerton & W. Co. v. Sult	33 N. D. 283	365
Tribune Printing & B. Co. v. Barnes	7 N. D. 591	113
Trubel v. Sandberg	29 N. D. 378	379
Turnquist v. Cass County Drain Comrs.	11 N. D. 514	102, 252

V

Valley v. Park Comrs.	16 N. D. 25	69
Van Gordon v. Goldamer	16 N. D. 323	280
Vermont Loan & T. Co. v. Whithed	2 N. D. 82	106

W

Wadge v. Kittleson	12 N. D. 453	635
Wadsworth v. Owens	17 N. D. 172	280
Walcott Twp. v. Skauge	6 N. D. 382	536
Ward v. McQueen	13 N. D. 153	150, 350
Weber v. Lewis	19 N. D. 473	185
Wenberg v. Gibbs Twp.	31 N. D. 46	537
Wessel v. D. S. B. Johnston Land & Mortg. Co.	3 N. D. 160	511, 512
West v. Northern P. R. Co.	13 N. D. 221	36
Westbrook v. Rice	28 N. D. 324	141
Willoughby v. Smith	26 N. D. 209	217
Wood v. Pehrsson	21 N. D. 357	34
Woods v. Walsh	7 N. D. 376	186
Woodward v. McCollum	16 N. D. 42	635

TABLE OF SOUTH DAKOTA CASES CITED IN OPINIONS.

		Page
Bright v. Juhl	16 S. D. 440	159
De Rue v. McIntosh	26 S. D. 42	206
De Smet Twp. v. Dow	4 S. D. 163	493
First Nat. Bank v. North	2 S. D. 480	363
Fish & H. Co. v. New England Homestake Co.	27 S. D. 221	288
Huntemer v. Arent	16 S. D. 465	151
Keen v. Fairview Twp.	8 S. D. 558	539
Koester v. Northwestern Port Huron Co.	24 S. D. 546	642
Laney v. Ingalls	5 S. D. 183	494
Lawrence v. Ewert	21 S. D. 580	538
McCarthy Bros. Co. v. Hanskutt	29 S. D. 535	642
Meek v. Meade County	12 S. D. 162	539
Miller v. Kennedy	12 S. D. 478	209
Moody v. Lambert	18 S. D. 572	369
Morgan v. State	9 S. D. 230	442
Mt. Terry Min. Co. v. White	10 S. D. 620	461
Northern Grain Co. v. Pierce	13 S. D. 265	217
Pyle v. Hand County	1 S. D. 385	493
Rectenbaugh v. Northwestern Port Huron Co.	22 S. D. 410	405
Schmidt v. Carpenter	27 S. D. 412	217
State v. Kirby	34 S. D. 281	103
Steele & Ballah v. Gingery	21 S. D. 183	271
Watson, Re	17 S. D. 486	86
Wayne v. Caldwell	1 S. D. 483	539
Woods v. Stacy	28 S. D. 214	225

CASES
ARGUED AND DETERMINED
IN THE
SUPREME COURT
OF
NORTH DAKOTA

NORTHERN TRUST COMPANY a Corporation, v. FIRST
NATIONAL BANK OF BUFFALO, a Corporation.

(156 N. W. 212.)

Action by a surety to compel restitution of county funds paid by the treasurer to defendant upon a private indebtedness. See Northern Trust Company v. First Nat. Bank, 25 N. D. 74.

Restitution of county funds — action for — surety — evidence — treasurer — checks — shortage of funds — county — damages.

1. Evidence examined and found to sustain the holding of the trial court that said treasurer was short in his accounts at the time of the issuance of each and every one of the checks in question; that the issuance of each of said checks created a shortage to the damage of said county; that the money used by said treasurer to pay his private indebtedness was at all times the money of said county.

Evidence — shortage — treasurer — county commissioners — public examiner — school districts — funds — payment.

2. Evidence examined and found to sustain the holding of the trial court that said shortage was never even temporarily made good; that the treasurer deceived the county commissioners and the public examiner, through books

33 N. D.—1.

which did not show the timely receipt of moneys coming into his hands as county treasurer; said books further showing the payment of funds to certain school districts, which payments were not, in fact, made.

Treasurer — county commissioners — shortage — settlement between — embezzlement — concealment of — such settlement not binding.

3. Settlement between an embezzling treasurer and the county commissioners, obtained by concealment of the embezzlement, is not binding upon the county.

Defaulting treasurer — books of — county cash — condition of — proof of accuracy — evidence — admissible.

4. Certain books kept by the defaulting treasurer through a deputy, showing the true condition of the county cash, proved by competent testimony to be accurate at the time they were made and without which the true condition of the county cash could not be ascertained, are admissible as evidence in an action of this kind.

Opinion filed December 28, 1915. Rehearing denied February 8, 1916.

Appeal from the District Court of Cass County. *Pollock, J.*
Affirmed.

Lawrence & Murphy and *Pollock & Pollock*, for appellant.

In legal effect, this action is by Cass county against the defendant. The cause of action accrues when consequential injury has followed official nonfeasance or misfeasance, and not before. *Northern Trust Co. v. First Nat. Bank*, 25 N. D. 74, 140 N. W. 705; 3 *Sutherland*, Code Pl. p. 2828; *Brooks v. The Governor*, 17 Ala. 806; *Johnson v. Marshall*, 34 Ala. 526.

"The procurement of the money by one from his friends, and placing it in the vaults of the bank, was a payment of the money he had before taken out for his own purposes. It thus became the property of the defendant." *Ingraham v. Maine Bank*, 13 Mass. 208; *Independent School Dist. v. Hubbard*, 110 Iowa, 58, 80 Am. St. Rep. 271, 81 N. W. 244; *Pine County v. Willard*, 39 Minn. 125, 1 L.R.A. 118, 12 Am. St. Rep. 622, 39 N. W. 72.

Sureties on the last bond are liable also for moneys paid to their principal during the term covered by the bond, but because of transactions which took place during the preceding term, even if such moneys are used to cover up defalcations occurring during a preceding term of the

officer. 29 Cyc. 1458, 1459; Mechem, Pub. Off. § 287; Throop, Pub. Off. § 219, pp. 235, 236.

Where state officers fail to perform their duties in requiring settlements from the treasurer, and of suing promptly on default, the surety is not discharged from liability. *Crawn v. Comp.* 84 Va. 282, 10 Am. St. Rep. 839, 4 S. E. 721; *Lauderdale County v. Alford*, 65 Miss. 63, 7 Am. St. Rep. 637, 3 So. 246; *Linville v. Leininger Twp.* 72 Ind. 491, and cases cited; *Bocard v. State*, 79 Ind. 270; *Brown v. State*, 78 Ind. 239; *Goodwine v. State*, 81 Ind. 112; *Ingraham v. Maine Bank*, 13 Mass. 208.

When money was in the treasurer's hands, there was nothing to identify it, or to distinguish it from other funds under his control, or rightfully belonging to him. *Colerain v. Bell*, 9 Met. 499; *Gwynne v. Burnell*, 7 Clark & F. 572, West, 342, 1 Scott, N. R. 711, 6 Bing. N. C. 853; *State v. Sooy*, 39 N. J. L. 539; *Com. ex rel. Mechanicsburg v. Knettle*, 182 Pa. 176, 38 Atl. 13; *Pine County v. Willard*, 39 Minn. 125, 1 L.R.A. 118, 12 Am. St. Rep. 622, 39 N. W. 71; *Crawn v. Com.* 84 Va. 282, 10 Am. St. Rep. 839, 4 S. E. 721; *Rogers v. State*, 99 Ind. 218; *Stone v. Seymour*, 15 Wend. 19; *Hecox v. Citizens' Ins. Co.* 9 Biss. 421, 2 Fed. 535; *State use of Buchanan v. Smith*, 26 Mo. 226, 72 Am. Dec. 204; *American Bonding & Trust Co. v. Milwaukee Harvester Co.* 91 Md. 733, 48 Atl. 74.

Where an officer holds for several, or more than one term, and it is afterwards discovered that he was in default, it will be presumed, in the absence of proof to the contrary, that the default took place during his last term, and the sureties on his last bond would be liable. *United States v. Earhart*, 4 Sawy. 245, Fed. Cas. No. 15,018; *Heppe v. Johnson*, 73 Cal. 265, 14 Pac. 833; *Kagay v. Trustees of Schools*, 68 Ill. 75; *Pape v. People*, 19 Ill. App. 24; *Fox Dist. Twp. v. McCord*, 54 Iowa, 346, 6 N. W. 536; *Bernhard v. Wyandotte*, 33 Kan. 465, 6 Pac. 617; *Stoner v. Keith County*, 48 Neb. 279, 67 N. W. 311; *Clark v. Douglas*, 58 Neb. 571, 79 N. W. 158; *Kelly v. State*, 25 Ohio St. 567; *Vaughan v. Evans*, 1 Hill, Eq. 414.

If the contrary position is taken, the burden of proof is upon them to show that the default occurred before their bond was given. *Weakley v. Cherry Twp.* 62 Kan. 867, 63 Pac. 433; *Readfield v. Shaver*, 50 Me. 36, 79 Am. Dec. 592; *Pine County v. Willard*, 39 Minn. 125, 1

L.R.A. 118, 12 Am. St. Rep. 622, 39 N. W. 71; Board of Education v. Robinson, 81 Minn. 305, 83 Am. St. Rep. 374, 84 N. W. 105; State v. Bobleter, 83 Minn. 479, 86 N. W. 461; Hetten v. Lane, 43 Tex. 279; Parsons v. Miller, 46 W. Va. 334, 32 S. E. 1017; Parker v. Medsker, 80 Ind. 158; Com. ex rel. Mechanicsburg v. Knattle, 182 Pa. 176, 38 Atl. 13; Custer County v. Tunley, 13 S. D. 7, 79 Am. St. Rep. 870, 82 N. W. 84.

Where money is in any manner brought into the treasury, even though it was intended to be and was afterwards again abstracted, the surety would be liable, and this is true even though such money was abstracted to pay liabilities incurred by the officer during his first term, where the money was received by the county treasurer in good faith. Pine County v. Willard, 39 Minn. 125, 1 L.R.A. 118, 12 Am. St. Rep. 622, 39 N. W. 72; State use of Buchanan County v. Smith, 26 Mo. 226, 72 Am. Dec. 204; People v. Hammond, 109 Cal. 384, 42 Pac. 36; Throop, Pub. Off. § 219; Anaheim Union Water Co. v. Parker, 101 Cal. 483, 35 Pac. 1084.

The doctrine is that the officer, when he enters upon a second term, must be presumed, in the absence of evidence to the contrary, to have on hand all the funds with which he is chargeable. Fox Dist. Twp. v. McCord, 54 Iowa, 346, 6 N. W. 537; Rogers v. State, 99 Ind. 218; 15 Decen. Dig. p. 754.

Where the same person holds the offices of county treasurer and of school district treasurer, and leaves school moneys to the credit of the county, to keep his county funds proper, he is short as school treasurer, and there and so liable, and there was no default as county treasurer. The county had its money, and it was not injured. Butte County v. Morgan, 76 Cal. 1, 18 Pac. 115.

Where the funds of a municipality are actually produced and accounted for as required by law, and settlement is effected, in the absence of fraud or mistake, this is conclusive, and no inquiry will be tolerated concerning the source whence any of the necessary money was derived. Boone County v. Jones, 54 Iowa, 699, 37 Am. Rep. 229, 2 N. W. 987, 7 N. W. 155; Morley v. Metamora, 78 Ill. 394, 20 Am. Rep. 266; Gage v. Chicago, 2 Ill. App. 332; Independent School Dist. v. Hubbard, 110 Iowa, 58, 80 Am. St. Rep. 271, 81 N. W. 242.

It being a payment and settlement, it was no concern of the county

where or how the money was procured. *Fremont County v. Fremont County Bank*, 145 Iowa, 8, 123 N. W. 782, Ann. Cas. 1912A, 1220.

The presumption of the law is against defalcation. *Independent Dist. v. King*, 80 Iowa, 500, 45 N. W. 908; *District Twp. v. Hardinbrook*, 40 Iowa, 130; *Independent School Dist. v. Hubbard*, 110 Iowa, 58, 81 N. W. 243.

It is presumed that an officer, succeeding himself in office, pays over to himself, as his own successor, the moneys on hand at the end of his prior term. *Custer County v. Tunley*, 13 S. D. 7, 79 Am. St. Rep. 870, 82 N. W. 84; *State ex rel. Causey v. Causey*, 93 S. C. 300, 76 S. E. 707.

A report made by a treasurer as part of his official duty, showing the amount of funds in his hands at the execution of his second bond, is binding on the sureties thereto. *Cawley v. People*, 95 Ill. 249; 11 Cyc. 449, note; *Cowden v. Trustees of Schools*, 235 Ill. 604, 23 L.R.A. (N.S.) 131, 126 Am. St. Rep. 244, 85 N. E. 924; *Roper v. Sangamon Lodge*, 91 Ill. 518, 33 Am. Rep. 60; *Longan v. Taylor*, 130 Ill. 412, 22 N. E. 745; *Boone County v. Jones*, 54 Iowa, 699, 37 Am. Rep. 229, 2 N. W. 987, 7 N. W. 155; *Chicago v. Gage*, 95 Ill. 593, 35 Am. Rep. 199; *Strong v. United States*, 6 Wall. 788, 18 L. ed. 740; *State v. Sooy*, 39 N. J. L. 539; *Seymour v. Van Slyck*, 8 Wend. 403; *Stone v. Seymour*, 15 Wend. 19; *Sandwich v. Fish*, 2 Grey, 298; *Morley v. Metamora*, 78 Ill. 394, 20 Am. Rep. 266; *Roper v. Sangamon Lodge*, 91 Ill. 518, 33 Am. Rep. 60; *Cawley v. People*, 95 Ill. 249; *Lauderdale County v. Alford*, 65 Miss. 63, 7 Am. St. Rep. 637, 3 So. 246; *Ingraham v. Maine Bank*, 13 Mass. 208.

The fact that the county commissioners knew, when they accepted his bond, that the treasurer had been chargeable with conversion of funds during the prior term, does not avoid the bond. *Pine County v. Willard*, 39 Minn. 125, 1 L.R.A. 118, 12 Am. St. Rep. 622, 39 N. W. 71; *Gwynne v. Burnell*, 7 Clark & F. 572, West, 342, 1 Scott, N. R. 711, 6 Bing. N. C. 853; *Colerain v. Bell*, 9 Met. 499.

No specific personal property is involved in this action. It is solely a question of money—not specific money, but a liability in money. And the identity of such cannot be established by a person's books of account, used as evidence upon issues between third parties. As to the party against whom they are sought to be used in such an action, such

books are private books. *Powers v. Hazelton & L. R. Co.* 33 Ohio St. 436; *Pittsburgh & L. E. R. Co. v. Cunningham*, 39 Ohio St. 327; *Kerns v. McKean*, 76 Cal. 87, 18 Pac. 122; *Ridgeley v. Johnson*, 11 Barb. 527; *Pittsburgh, C. & St. L. R. Co. v. Noel*, 77 Ind. 110; *State Bank v. Brown*, 53 L.R.A. 513, and note 11, 165 N. Y. 216, 59 N. E. 1.

Pierce, Tenneson, & Cupler, and *Watson & Young*, for respondent.

Defendant's persistent assertion that there was no shortage as far as the county was concerned, and that if there was any embezzlement it was that of school district money, is wholly beside the question. The money was collected by the officer as county treasurer; it belonged to the county until there was a distribution to, and setting apart of the funds to, the school district. *Walker v. State*, 176 Ind. 40, 95 N. E. 353.

Under such conditions the abstracting of any part of it was an embezzlement of the funds of the county. *Armstrong v. State*, 145 Ind. 609, 43 N. E. 866; *Hollingsworth v. State*, 111 Ind. 289, 12 N. E. 490; *Kennedy v. Miller*, 97 Cal. 429, 32 Pac. 558; *Gridley School Dist. v. Stout*, 134 Cal. 592, 66 Pac. 785; *Detroit v. Weber*, 29 Mich. 24.

The burden of proof is on defendant to show shortage repaid. *Dickinson v. White*, 25 N. D. 523, 49 L.R.A.(N.S.) 362, 143 N. W. 754.

The cashing of the checks in question created a shortage in the bank accounts of Cass county, and that such shortage was never made good. *Oakland v. Snow*, 145 Cal. 419, 78 Pac. 1060.

The exhibits—the ledger and cash book—kept by the treasurer, and properly identified as such, and as to their accuracy, were admissible in evidence to show the shortage. *Laws 1907*, chap. 118, *Rev. Codes 1905*, §§ 7298 & 7299, *Comp. Laws 1913*, §§ 7917, 7918.

And the statutory requirement that certain books and records are to be kept by the officer is not in all cases a prerequisite to the admission of the same as evidence. *State v. Hall*, 16 S. D. 6, 65 L.R.A. 151, 91 N. W. 325; *Jones*, Ev. § 511 and cases cited in note 82; *Coleman v. Com.* 25 Gratt. 865, 18 Am. Rep. 711; *Kyburg v. Perkins*, 6 Cal. 675; *Cooper v. People*, 28 Colo. 87, 63 Pac. 314; *Hesser v. Rowley*, 139 Cal. 410, 73 Pac. 156; *Lynn v. Cumberland*, 77 Md. 449, 26 Atl. 1001; *State Bank v. Brown*, 165 N. Y. 216, 53 L.R.A. 513, 59 N. E. 1.

“To make entries upon account books admissible in evidence, it is not always necessary that the transactions to which they relate or apply

should have been directly between the original creditor and debtor." *Bridgewater v. Roxbury*, 54 Conn. 213, 6 Atl. 415.

Especially where the entries so made and kept are against the interests of the party making them at that time. *Poor v. Robinson*, 13 Bush, 290; *Livingston v. Tyler*, 14 Conn. 493; *Still v. Reese*, 47 Cal. 294; *Jones v. Howard*, 3 Allen, 223; *Bridgewater v. Roxbury*, 54 Conn. 213, 6 Atl. 415; *Zang v. Wyant*, 25 Colo. 551, 71 Am. St. Rep. 145, 56 Pac. 565; *Humphrey v. People*, 18 Hun, 393; *American Surety Co. v. Pauly*, 18 C. C. A. 644, 38 U. S. App. 254, 72 Fed. 470, affirmed in 170 U. S. 133, 42 L. ed. 977, 18 Sup. Ct. Rep. 552; *Nicholls v. Webb*, 8 Wheat. 326, 5 L. ed. 628; *Hancock v. Kelly*, 81 Ala. 368, 2 So. 281; *Dow v. Sawyer*, 29 Me. 117; *State v. Phair*, 48 Vt. 366; *Hatfield v. Perry*, 4 Harr. (Del.) 463; *Wood v. Coosa & C. R. Co.* 32 Ga. 273.

"Books of account kept by a deceased agent, proved to be in his handwriting, are admissible in evidence in favor of his principal against a third party, where on inspection they appear to have been fairly kept, in the regular course of the business of his agency, and relating to the matter in controversy." *Dow v. Sawyer*, 29 Me. 117; *Grover v. Morris*, 73 N. Y. 473; *Rand v. Dodge*, 17 N. H. 343; *Vinal v. Gilman*, 21 W. Va. 301, 45 Am. Rep. 562; *Agricultural Ins. Co. v. Keeler*, 44 Conn. 161; *Glover v. Hunter*, 28 Ind. 185; *Morrell v. Adams Exp. Co.* 1 Walk. (Pa.) 388; *Whitnash v. George*, 8 Barn. & C. 556; *State Bank v. Johnson*, 1 Mill, Const. 404, 12 Am. Dec. 645; *Post v. Kenerson*, 72 Vt. 341, 52 L.R.A. 562, 82 Am. St. Rep. 948, 47 Atl. 1072.

Settlements made between the county treasurer and the commissioners are not conclusive upon the county, where there had been embezzlement and same had been concealed from the commissioners, or where all the material facts are not known. *Goose River Bank v. Willow Lake School Twp.* 1 N. D. 26, 26 Am. St. Rep. 605, 44 N. W. 1002; *Capital Bank v. School Dist.* 1 N. D. 479, 48 N. W. 363; *Engstad v. Dinnie*, 8 N. D. 1, 76 N. W. 292; *Hosmer v. Sheldon School Dist.* 4 N. D. 197, 25 L.R.A. 383, 50 Am. St. Rep. 639, 59 N. W. 1035; *State ex rel. Diebold Safe & Lock Co. v. Getchell*, 3 N. D. 243, 55 N. W. 585; *Fox v. Walley*, 13 N. D. 610, 102 N. W. 161.

Laches in prosecuting such claims cannot be set up in bar of the suit, nor can negligence of the examining officers. *Storey v. Murphy*, 9 N.

D. 115, 81 N. W. 23; *United States v. Kirkpatrick*, 9 Wheat. 720, 6 L. ed. 199; *United States v. Vanzandt*, 11 Wheat. 184, 6 L. ed. 448; *Detroit v. Weber*, 26 Mich. 284; *Newark v. Stout*, 52 N. J. L. 35, 18 Atl. 943; *Palo Alto County v. Burlingame*, 71 Iowa, 201, 32 N. W. 259; *Bush v. Johnson County*, 48 Neb. 1, 32 L.R.A. 223, 58 Am. St. Rep. 673, 66 N. W. 1023; *Jefferson County v. Lineberger*, 3 Mont. 231, 35 Am. Rep. 462; *State v. Edwards*, 89 S. C. 224, 71 S. E. 826; *Newburyport v. Davis*, 209 Mass. 126, 95 N. E. 110.

County authorities in making settlements with the officials act ministerially rather than judicially, and their determination is no more conclusive than a settlement between private persons. *Throop*, Pub. Off. §§ 282-285; *State v. Krause*, 58 Kan. 651, 50 Pac. 882; *Newark v. Stout*, 52 N. J. L. 35, 18 Atl. 943; *Rogers v. State*, 99 Ind. 218; *Zuellig v. Casper*, 37 Ind. App. 186, 76 N. E. 646; *Kinney v. People*, 4 Ill. 357; *Washington County v. Parlier*, 10 Ill. 232; *Hunt v. State*, 93 Ind. 311; *Satterfield v. People*, 104 Ill. 448; *State use of Carroll County v. Roberts*, 62 Mo. 388; *Burlington Justices v. Fennimore*, 1 N. J. L. 190; *Ferry v. King County*, 2 Wash. 337, 26 Pac. 537; *Cumberland County v. Edwards*, 76 Ill. 544; *Palo Alto County v. Burlingame*, 71 Iowa, 201, 32 N. W. 259; *Bush v. Johnson County*, 48 Neb. 1, 32 L.R.A. 223, 58 Am. St. Rep. 673, 66 N. W. 1023; *Rush County v. State*, 103 Ind. 497, 3 N. E. 165; *Jefferson County v. Lineberger*, 3 Mont. 231, 35 Am. Rep. 462; *Jefferson County v. Jones*, 19 Wis. 52; *Sexton v. Richland County*, 27 Wis. 349; *Heritage v. State*, 43 Ind. App. 595, 88 N. E. 114.

Findings of the trial court in actions at law, where a jury has been waived, are entitled to the same weight as a verdict of a jury, and same will not be disturbed, unless against the clear preponderance of the evidence. *James River Nat. Bank v. Weber*, 19 N. D. 702, 124 N. W. 952.

BURKE, J. Appeal from a trial to the court without a jury. Although both respondent and appellant insist that there is no dispute as to the material facts, we find that they disagree when it comes to their statements. In the 1906 elections, one McConville, who was serving as deputy county treasurer of Cass county, was elected treasurer. He was,

however, short in his accounts as deputy, and to make up such shortage borrowed \$2,500 of defendant.

It was agreed by McConville that this \$2,500 should be repaid to the bank from his salary as county treasurer at the rate of \$100 and interest per month. January 4, 1907, McConville became treasurer, and the Northern Trust Company furnished his official bond. January 7, three days later, McConville extracted \$112.11 from the cash drawer; January 26, \$190.99; January 31, \$10,—a total of \$313.10. January 10th he issued a check upon the deposits of Cass county in favor of the Union Light, Heat, & Power Company for \$7.46; January 7, to T. M. Roberts, check for \$1.37,—a total of \$9.83. Thus, upon February 1st, he had used \$322.93 of county money as against his salary of \$192.90. This fact is material because it shows a shortage from the very beginning. The first check issued in payment of this indebtedness to the Buffalo bank was on April 10, 1907, for \$108.66. At this date he had taken from the cash drawer, moneys, belonging to the county, \$804.69, and he issued county checks to pay his private indebtedness in the further sum of \$55.81, a total of \$860.55. His salary for January, February, and March amounted to \$609.56. He was therefore \$250 short before the issuance of the first check to the defendant. From that time on, this shortage continued, until, at the end of two terms, he had extracted from the cash drawer, \$10,655.11, and had written unauthorized checks in the sum of \$9,034.85, a total of \$19,689.96. His salary amounted to \$9,841.58, leaving a shortage of \$9,848.38. He claimed, however, a commission for handling certain funds, which, if allowed, would reduce the shortage to \$7,258.28. The county contests the allowance of this commission, but it is not material to this litigation. McConville pleaded guilty to embezzlement and was sentenced to the penitentiary. Cass county recovered judgment against the trust company upon the bond in something over \$7,500. During the four years in office, McConville had issued checks drawn upon the funds of Cass county to the First National Bank of Buffalo for \$2,564.22 upon his private indebtedness to the bank, and now the trust company brings action against the bank for said sums, claiming to be subrogated to the rights of Cass county. The bank at first demurred, but in *Northern Trust Co. v. First Nat. Bank*, 25 N. D. 74, 140 N. W. 705, this court held that the complaint stated a cause of action. Upon trial below to

the court without a jury, findings of fact and conclusions of law favorable to plaintiff were entered. This appeal is from the judgment. Some of the questions which would otherwise arise have been settled in the former appeal. Appellant no longer questions the right of subrogation, but divides his present defense into four portions, which will be treated in the four paragraphs following:

(1) Appellant claims that "plaintiff has wholly failed to establish that the issuance of the checks in question created any shortage or caused any damage to the county of Cass, and that the evidence in the case is undisputed that no shortage was caused or created by the issuance of the checks in question." It is his claim that moneys were secured from other sources, partly from school districts, to make good the shortage, and that said funds were kept in the county depositories sufficient at all times to meet any demand that Cass county might have had against McConville. He states in his brief: "Cass county on any day from the 4th of January, 1907, to February 9, 1909, could have taken Mr. McConville out of his office, removed him before any entry had been made upon the books, appointed a new treasurer, such treasurer over his official signature as treasurer of Cass county could have withdrawn from the vaults of the various banks of Cass county every dollar which was due and owing to Cass county." And again: "Amounts appearing upon the books of the county treasurer were paid over to McConville as school district treasurer by making a record of the same and separating the same in the accounts from the county money. Instead, however, of using this money for school district purposes, McConville placed it in the name of Cass county, and gave Cass county the title to it; whether it was taken by permitting it to remain in the vaults of the county treasurer, or was withdrawn and then replaced annually, is immaterial. . . . He was short actual cash as school district treasurer, not as county treasurer." Appellant further states: "The ultimate and important fact is that when the school districts or other persons from whom McConville had embezzled money to use as county treasurer subsequently received their money, then, and not until then, was McConville unable to produce money to fulfil his liabilities to the county, and that is when the first shortage occurred which caused injury or damage to the county of Cass." Appellant's position

is ingenious, but unsound. A study of the testimony will not bear out his contention.

When McConville was elected treasurer the law authorized the county superintendent of schools to appoint the county treasurer as treasurer of any school district in the county under certain contingencies. McConville thus became the treasurer of four school districts. Section 1472, Comp. Laws 1913, provides: "All funds of each and every city or school district of this state shall be deposited by the treasurer of the city, county, or school district, as soon as received by him, in the name of the city or school district of which he is an officer, in such bank or banks as shall have been designated as city or school district depositories in accordance with this article, as hereinafter provided." One of the ways in which McConville concealed his shortage with the county was to pretend to turn over to himself as school district treasurer moneys for the school district, but, in fact, leave all of said money in the county deposits. Another way was to delay the issuance of tax receipts.

The testimony of the deputy, Mayo, follows:

A. Every time an examination was made, whether by the county commissioners or by the public examiner, there was money on hand to balance the report as they found it—Otherwise, why, there would be a stopper right there.

By the Court. How did that all come about, Mr. Mayo?

A. Well, now, I could explain if I had permission to do it my own way.

. . . Now, say, for instance, the public examiner comes along in February. The penalty goes on taxes the first of March and during the month of February there would be possibly \$200,000 that will come into that office that there is not a receipt issued for. There is nothing to prevent the treasurer from taking \$100,000 at that time and still have money enough to settle up everything easily.

By the Court. That is, \$100,000 money that he has not given a receipt for yet?

A. Yes. You know those tax receipts—some people do not get their tax receipts until sixty days after the first of March. They cannot be gotten out in one day—cannot be gotten out in a month.

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Q. He wasn't charged with it in that report which you say he made, was he?

A. No, he was not.

Q. He was charged with a less amount than he actually had on hand; is that right?

A. He wouldn't be charged with any money until receipts of some kind had been issued for that money.

Q. So that in the interim and until those receipts were issued, he apparently had more money in the bank than he was charged with; that is correct, isn't it?

A. Yes, sir.

Q. Now, do you mean, Mr. Mayo, that the depletion of the bank account, which you say was caused by the issuance of each of these checks which was offered in evidence, was made up, or did he continue short?

A. It was only—

Q. Did he make it up?

A. Did he—no.

Q. He didn't, did he? He was short all the time, wasn't he, Mr. Mayo?

A. His account was overdrawn all the time.

Q. Now, if the examiner had looked in this ledger which you say you kept, and which is offered here as exhibit B, he would have immediately seen that he was short?

A. Yes, sir.

Q. All the time?

A. Yes, sir.

Q. The true condition of the accounts wasn't shown by those reports or county books?

A. No, sir.

This witness testifies that he kept track of the shortage by means of two correct cash books or ledgers, known as exhibits A and B, being the exhibits which we hold admissible in paragraph 4.

One Thompson, expert accountant, also testified that a thorough ex-

amination of the books showed a shortage at the time each check was issued to defendant.

We quote from his testimony:

Q. Now, did you make any examination of the books to ascertain whether or not, at the time of the drawing of the checks to the First National Bank of Buffalo, McConville had withdrawn cash from the drawer in excess of the salary earned at that time?

A. Yes, sir, I did.

Q. Just take your book there and give us the result of your computation as to the first check that was drawn to the First National Bank of Buffalo.

A. Was for \$108.66. . . . Up until the time that this check was drawn and paid, he had drawn out in actual cash from the cash drawer, \$804.69, and had deposited salary warrants, including the warrant deposited April 2d, of only \$609.56, so that he had drawn cash in excess of his salary warrants to the amount of \$195.13, when this first check was issued.

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Q. Now going down, without stopping to take each check, go down to the last of the account and at the last of the checks and give us the standing of his accounts at the time he drew that check. . . . Well, your final footings now would include all of the twenty-six checks. What was the standing of his account at that time?

A. That would include the last check that was drawn. He had withdrawn cash, \$10,655.17, and had put in the cash drawer salary warrants amounting to \$9,841.58, so that the excess of cash withdrawn was \$813.59. . . .

Q. You can tell the standing of his account at any time?

A. At any time.

Q. That he drew any one check?

A. Yes.

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Q. So that the salary warrants which he put in the cash drawer, as you say, did not cover the actual cash which he had withdrawn from the drawer?

A. No.

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(Upon Cross-Examination)

Q. In other words, you found a bookkeeping shortage?

A. No, an actual shortage.

Q. But you do not know of any actual physical shortage, at any time except at the end of the term?

A. And every day during the term.

Q. But, on the other hand, he could have settled on the official books and produced every dollar due the county, if he had produced according to their records, couldn't he?

A. No, sir. He would have to settle according to the auxiliary books (A and B).

Q. How did he settle with the county commissioners from time to time, as they reported that he had sufficient funds on hand? They did not have the auxiliary books before them?

A. He was not examined properly.

Q. So far as his examination disclosed, there might have been sufficient money in the banks and in the cash drawer on the 1st day of January to have fulfilled every obligation against Mr. McConville, might there not?

A. No, there could not because his cash book—this auxiliary cash book (A or B)—shows what cash he had on hand.

Q. Can you from this book, from the cash book, exhibit A, by computation at any time on any of the dates these checks were issued, ascertain the amount of money which was on deposit at the various banks?

A. Yes, sir. It would be a long computation, but it could be done.

Mr. Thompson then explained the handling of the school district funds as follows: "He had at different times large sums in his hands as treasurer of school district No. 96. . . . Mr. McConville would get a warrant from the auditor's office for school district No. 96. . . . This warrant would read, payable to H. A. McConville, treasurer of school district No. 96. He would take that warrant, put it in as so much cash, and turn to his auxiliary set and give school district No. 96 credit for that amount of money.

Q. But would he pay the money to school district No. 96 at that time?

A. Instead of taking that money out and depositing it to the credit of H. A. McConville, treasurer, and disbursing it in a separate account, as the present treasurer does, he would put it in Cass county money.

Q. You mean he would take it out of Cass county moneys? It was there all the time.

A. He simply canceled the warrant.

Q. Did he not receive this money from the taxpayers as county treasurer in the first place?

A. In the first place.

Q. And have it in his possession all the time?

A. All the time.

Q. Now, when he received a warrant payable to H. A. McConville, treasurer of school district No. 96, you say he did not pay that warrant in cash at the time?

A. No.

Q. Now, that is one of the methods, is it, by which Mr. McConville could have fooled the county commissioners or whoever examined his office?

A. Yes, sir.

Q. And an examination of the auxilliary books (A & B) would have disclosed immediately that the school district had not been paid that money?

A. Yes, sir, every time.

Q. And that the shortage really existed in the account of H. A. McConville?

A. In the debit item of H. A. McConville.

Q. Did you make an investigation to ascertain how much McConville was short, and of what items it consisted?

A. I did; yes, sir.

Q. What was it?

A. The total amount withdrawn from the county funds in the banks

by cash and checks charged to the account of H. A. McConville was \$9,848.44.

Q. Can you state from your examination of the books whether any part of the money has ever been restored to Cass county?

A. By McConville? No.

Moreover, an examination of exhibits A and B shows conclusively that at the time each separate check was drawn to the Buffalo bank the shortage was increased in McConville's account with the county. This shortage is a real, and not a "bookkeeping," shortage. From the testimony of the witnesses already quoted and from the examination of exhibits A and B, it appears that the cash book kept by McConville, and exhibited to the examiner and to the county commissioners, was inaccurate and false at the time it was exhibited to those officials. For instance, if a resident of one of the outlying precincts should send a check for \$50 to pay his taxes, McConville would place this \$50 in the cash drawer, and would not enter the amount upon the books nor charge himself, as county treasurer, with the same until a later date. This \$50, with other similar accounts, was used by McConville to conceal a shortage caused when he had taken money from the cash drawer. Let us say that there were \$7,000 worth of such checks in the county funds, and he was deposed as treasurer. The taxpayers who had furnished this money would sue the county, showing that their checks had reached the treasurer's office and had been deposited to the credit of the county; can it be doubted that Cass county would be liable? And again let us suppose that McConville pretended to pay out \$7,000 of the county's money to himself as treasurer of one of the school districts, but that in fact the money remained in the Cass county treasury. Supposing, then, that McConville was removed as county treasurer, and the school district sued Cass county for the money, showing that this particular \$7,000 had always remained part of the Cass county funds. Can it be doubted that the school district would recover judgment? The fact that appellant by leading questions induced the witness Mayo to testify that there was always cash on hand to balance the *report furnished by McConville to the county commissioners* is immaterial. The question is not whether there was money enough to balance a set of doctored books, but whether there was money enough to pay what McConville owed Cass county.

It is therefore too plain for argument that each and every check issued by McConville upon the Cass county funds to pay his private debt to the bank constituted a shortage in the county funds which existed from that time until paid by the trust company, and that this shortage was never made good by McConville.

(2) Appellant's next defense is: "Subsequent to the issuance of the checks in question, full and complete settlement was had between the county of Cass and the county treasurer involved, and said county received all moneys due it from said county treasurer, and that said settlement is conclusive upon said county and this plaintiff." Much that we have said in paragraph 1 applies to this defense. McConville did not make good his shortage, but deceived the county commissioners through false reports. Neither is there merit in the contention that the county was bound by those settlements. It is elementary that settlements obtained by fraud with the officers of corporations are not binding upon the corporation. Such has been the holding of our court in *Goose River Bank v. Willow Lake School Twp.* 1 N. D. 26, 26 Am. St. Rep. 605, 44 N. W. 1002; *Capital Bank v. School Dist.* 1 N. D. 479, 48 N. W. 363; *Hosmer v. Sheldon School Dist.* 4 N. D. 197, 25 L.R.A. 383, 50 Am. St. Rep. 639, 59 N. W. 1035; *State ex rel. Diebold Safe & Lock Co. v. Getchell*, 3 N. D. 243, 55 N. W. 585; *Engstad v. Dinnie*, 8 N. D. 1, 76 N. W. 292; *Fox v. Walley*, 13 N. D. 610, 102 N. W. 161; See also notes in 7 L.R.A.(N.S.) 1187, and 118 Am. St. Rep. 546; 11 Cyc. 442, from which we quote: "County authorities, in making settlements with the officials, act ministerially, rather than judicially, and their determination is no more conclusive than a settlement between private persons." Cases supporting this text will be found under the Cyc. citation.

(3) Appellant's third defense is that the records "of the county of Cass established such settlement with said county treasurer and the fact that all the county's moneys were on hand, and such records are conclusive upon the said county and the plaintiff." This defense is completely answered by what we have said in paragraph 2.

(4) Appellant's fourth defense is that "all the rights of the plaintiff, and his theory of establishing the liability upon the defendant, are based upon the evidence furnished by certain private books. These books are claimed by the defendant to be inadmissible, and if not

properly admitted in evidence there is no proof whatever of any shortage." A complete answer to this defense is that a shortage is proven by other competent testimony as we have shown in paragraph 1. But there is no doubt about the admissibility of exhibits A and B. Those books are before us, and each one is a large book, sheep-bound, 18" x 12" x 2", containing 425 and 600 pages respectively. Those books are nearly filled with the cash accounts of Cass county. From the testimony it is evident that an accurate examination of the county funds could not be had without those books. Mr. Thompson testified that a complete examination shows that they were correctly kept and accurate. They are almost entirely in Mr. Mayo's handwriting, a few entries being found in the handwriting of Mr. McConville.

Mr. Mayo says:

Q. Did you keep that (exhibit B) for the purpose of knowing what the condition of your cash was at any time you might want to turn to the books?

A. Yes, sir.

Q. Did you keep them for the purpose of ascertaining the condition of your bank account with those different depositaries at any time you might want to turn to the books?

A. That is the only place that that depositary system was kept.

. . .

Q. Well, now, is it a fact that the auxiliary books were kept for the purpose and were necessary in order to show the true condition of the office at any time in a county like Cass?

A. Yes, sir. It is, absolutely.

The books in question were admissible for several reasons. First, Mr. Mayo was a witness and had a right to use these books as memorandum to refresh his memory. He had testified that they were in his handwriting and were accurate when made. Again, they were admissible as part of the *res gestæ*. They are also admissible as official records because they were necessary to an understanding of the affairs of the office. The respondent also claims that they were admissible under § 7909, Comp. Laws 1913. The authorities sustain their admission as public records. Jones on Evidence, § 511, states: "In the United States, somewhat greater latitude seems to have been allowed,

and it has frequently been held that such entries are admissible, if made in the course of official duty, although not required to be made by law." 1 Greenleaf on Evidence, 14th ed. § 496, note, says: "Whenever a written record of the transactions of a public officer in his office is a convenient and appropriate mode of discharging the duties of the office, it is his duty to keep that record whether required by law so to do or not; and such record is a public record belonging to the public, and not to the officer." In *Cooper v. People*, 28 Colo. 87, 63 Pac. 314, it is said: "Where a clerk of a district court entered in a book, in which he was not bound to make such entries, the receipt of fees collected by him, such book was properly admitted in evidence to prove the receipt of such fees in an action on the clerk's bond."

In *Bridgewater v. Roxbury*, 54 Conn. 213, 6 Atl. 415, it is held: To make entries in account books admissible in evidence, it is not always necessary that the transactions to which they apply should have been directly between the original creditor and debtor. In the same case it is held: Where the person who made entries in an account book, which is admissible in evidence, is beyond the reach of process, or is incompetent to testify, it is the same as though he were dead and his handwriting may be proved. Although *McConville* was not dead at the time of this trial, he was in the penitentiary. See note to *State Bank v. Brown*, 53 L.R.A. 513, and also note to *Post B. & O. Employees Relief Assn. v. Kenerson*, 52 L.R.A. 562, from which we quote:

"It is not true that the allowing of the original entries in books made at the time the transaction occurred, in the usual and regular course of business, by a party having personal knowledge of the transaction recorded, is permitted only from necessity; on the contrary, other and very strong reasons are given for the admission of such entities as evidence; first, they are a part of the *res gestæ*; secondly, general convenience is much promoted by their admission as evidence. These reasons would lead to the conclusion that such entries as above described, being proved to possess all these qualities, might properly be admitted as evidence whether the person who made them is produced in court or not, or whether his absence be accounted for or not,—especially if it were proved that his books were generally correctly kept. These entries are a part of the *res gestæ* whether he be present at the trial or not, and the general rule is that all the *res gestæ* may and should be proved to pro-

mote the ends of justice. All the requisites of such an entry, which we have specified above, may be proved by others to exist, as well as by the bookkeeper. Others may prove the entry to have been an original entry, made at the time and in the regular course of business, by one acquainted with the transaction recorded in the entry. Surely such an entry, as a part of these *res gestæ*, is in itself valuable evidence in our search for truth, even when unaided by the evidence of the bookkeeper; and it is regarded by the courts, as the decisions show, as legitimate evidence, though the bookkeeper in no manner supports it by his testimony."

This court in *Dickinson v. White*, 25 N. D. 523, 49 L.R.A.(N.S.) 362, 143 N. W. 754, disposes of the contention that this shortage was presumed to have occurred during the last term of office. From the foregoing authorities and many others cited in the L.R.A. notes, it is apparent that exhibits A and B were properly received in evidence.

This disposes of defendant's four separate defenses, and it follows that the judgment must be affirmed.

FRANK ENNIS v. RETAIL MERCHANTS ASSOCIATION MUTUAL FIRE INSURANCE COMPANY, a Corporation.

(156 N. W. 234.)

Waiver — doctrine of — defense — failure to disclose — when demand made — other grounds relied upon — knowledge of the facts — defense as stated — intention to abandon — concealment — misleading — injury — — insurance company — premium — policy — conditions.

1. The doctrine of waiver will not be extended so as to deprive a party of his defense, merely because he negligently or incautiously, when the claim is first presented, while denying his liability, omits to disclose the ground of his defense, or states another ground than that upon which he finally relies. There must, in addition, be evidence from which the jury would be justified in finding that with full knowledge of the facts there was an intention to abandon, or not to insist upon the particular defense afterward relied upon, or that it was purposely concealed under circumstances calculated to, and which actually did, mislead the other party to his injury. The mere fact, therefore, that an insurance company, during the negotiations between the parties after a

loss, merely justifies its refusal to pay the claim on the ground that the premium was not paid, does not debar such insurance company from interposing a defense based upon proper pleadings, that the conditions of the policy in regard to the making of an inventory and of the keeping of books of account and the keeping of the same in an iron safe have been violated.

Inventory — making of — condition of policy — special pleading.

2. The defense that the insured had not made an inventory and kept books of his purchases and sales, and kept the same in an iron safe, as provided by the terms of his policy, is one which must be specially pleaded in an action upon such insurance policy.

Trial judge — answer — amendment — disallowance — trial and judgment — new amendment allowed after — judgment notwithstanding the verdict — error.

3. It is error for a trial judge, after he has refused to allow the amendment of an answer upon the trial, in order that a certain defense may be interposed, and has thus lulled the plaintiff into a sense of security that no such defense can be relied upon, to afterwards, and after a verdict has been rendered in favor of the plaintiff and judgment has been entered thereon, to allow an amendment to the answer setting up such defense so that a judgment notwithstanding the verdict may be entered thereon.

Policy of insurance — gross premium — building — contents — amount of insurance — provisions of policy — as to — divisible policy.

4. Where a policy of insurance is written for a gross premium, but the insurer agrees to pay a certain amount in case of the destruction of a building by fire, and a certain other amount in the case of the destruction of its contents, and the policy contains a provision that books must be kept of purchases and sales, and such books must be kept in an iron safe, the policy is divisible in so far as such clause or condition is concerned, and such clause or condition will not be held to apply to the insurance upon the building itself.

Discretion — answer — amendment — new defense — books of account — motion for — at close of trial — discovery of new facts — showing on — as to time.

5. It is not an abuse of discretion on the part of a trial judge to refuse to allow the filing of an amendment to the answer in an action on a fire insurance policy, and which amendment sets up the new defense, that the insured, in violation of the terms of the policy, failed to keep books of account of his sales and purchases, and to keep said books within an iron safe, when such motion is not made until after the close of plaintiff's testimony, and neither throughout the prior negotiations for a settlement, nor in the original answer, had the defendant in any manner suggested the defense, and the trial was held at a place more than a hundred miles from the home of the plaintiff

and of his attorneys, and there was no showing that, prior to the making of such motion, the defendant was not aware of the new facts sought to be pleaded.

On Petition for Rehearing.

6. Where an insurance company refuses to consider a claim for the loss of goods destroyed by fire, on the ground that the premium has not been paid, and on that ground alone, and at no time asks for formal proofs of loss or furnishes blanks therefor, it will not be permitted to interpose upon the trial, when sued for the loss, the defense that such formal proofs were not furnished as required by the policy.

7. The defendant is not entitled, as a matter of right, to amend his answer upon the trial so as to set up a new and added defense, and the trial court, under § 7482 of the Compiled Laws of 1913, is only authorized to grant permission to do so when such permission would be in furtherance of justice.

8. Although, on the reversal by the supreme court of a judgment notwithstanding the verdict, the cause will be remanded to the district court with leave to the respondent to perfect a motion for a new trial in cases where he asked for a new trial in the alternative and in connection with the motion for a judgment notwithstanding the verdict, and it is apparent that error was committed on the trial which would justify the granting of such new trial, no such leave will be granted when it is apparent that no error was committed.

9. Where upon the trial the court refuses to permit an amendment to the answer which sets up a defense, which, under the peculiar facts of the case, is purely technical, and at the close of the trial the judge sets aside a verdict for the plaintiff, and allows such amendment, and orders a judgment entered for the defendant notwithstanding such verdict and notwithstanding the fact that the evidence in support of the amendment was objected to, the supreme court, if it reverses such judgment notwithstanding the verdict on an appeal taken, will take into consideration the technical nature of the defense in determining whether the cause should be remanded to the district court with leave to perfect the motion for a new trial and in order that such defense may be pleaded and interposed, and whether the remanding of the cause for such purpose would be in furtherance of justice.

Opinion filed January 4, 1916. On petition for rehearing February 9, 1916.

Appeal from the District Court of Cass County, *Pollock, J.*
Action to recover on a fire insurance policy. Verdict and judgment

for the plaintiff, which is set aside and a judgment notwithstanding the verdict entered for the defendant. Plaintiff appeals.

Reversed, and the former verdict and judgment ordered reinstated.

Statement of facts by BRUCE, J.

This is an action to recover on a fire insurance policy, and the appeal is from the action of the district court in setting aside a verdict for the plaintiff and entering judgment for the defendant notwithstanding the same.

The complaint alleged that the defendant was engaged in the general fire insurance business; that on October 12, 1912, the plaintiff was the owner and in possession of a certain lot at Pettibone, North Dakota, and in the possession of certain agricultural implements, repairs, furnishings, etc.; that on January 19, 1913, the building was of the value of \$650 and the agricultural implements, etc., of the value of \$4,182; that on October 12, 1912, the defendant entered into a contract of insurance with the plaintiff under and by virtue of which the defendant, for a valuable consideration, duly paid, made, executed, and delivered to the plaintiff an insurance policy insuring said property against loss by fire for a period of one year from October 12, 1912, limiting its liability for a loss in any sum not greater than \$500 on said building, and for a loss in any sum not greater than \$2,000 on said machinery, which said policy and contract of insurance was then and there delivered to the plaintiff; that said insurance policy is No. 1028, and is *now and at all times since October 12, 1912, has been in full force and effect*, and plaintiff is now and at all times since October 12, 1912, has been the owner of said insurance policy and contract; that on January 9, 1913, without fault or negligence on the part of the plaintiff, the said building and machinery were destroyed by fire and the plaintiff suffered loss thereby in the sum of \$4,832; that immediately thereafter the plaintiff notified the defendant of such loss by telephone message and by letter in writing, and demanded from said defendant that it send plaintiff proof of loss blanks, and that thereafter on or about March 4, 1913, the defendant, having at all times failed, refused, and neglected to send any such proof of loss blanks, made and sent to the defendant full and complete proofs of loss under said policy and contract of insurance, all of which defendant received and has wholly

failed and neglected to object to; that the plaintiff has offered in writing to arbitrate any and all differences of the sums or amounts of loss sustained in said matter, but that the said defendant has wholly refused, failed, and neglected to arbitrate said matters or any part thereof; *that plaintiff has in all things conformed to the terms of his said insurance policy and contract on his part to be performed*, and has at all times offered to and been ready, willing, and able to further perform any other terms of said contract on his part to be performed, or conditions which defendant might, in reason, desire this plaintiff to perform; that there is due and owing to the plaintiff from defendant by reason of the premises aforesaid, the sum of \$2,500, with interest at the rate of 7 per cent per annum from January 19, 1913.

For answer to this complaint the defendant admitted the formal allegations, and admitted the issuance of the policy, but denied "that the plaintiff at any time paid the defendant the premium or consideration for said insurance policy, *and denies that said insurance policy is in force or effect.*" It also denied having any knowledge or information sufficient to form a belief thereon of the allegations of the complaint as to the ownership of the lot and of the machinery and repairs, and, in addition to these denials, *generally denied all of the allegations of the complaint.* It further alleged "that the premium named in said policy of insurance, referred to in said complaint, and for which the plaintiff became indebted to this defendant, was not paid in cash or unconditional notes within sixty days from the issue of said insurance policy, or at all, and that by the provisions of § 4440, Revised Code of North Dakota for 1905, as amended by chapter 143, Laws of 1907, Comp. Laws 1913, § 4874, said policy of insurance became on the 12th day of December, 1912, absolutely void and of no force and effect, for nonpayment of such premium, and has ever so remained since said date."

After the rendition of the verdict and the entry of the judgment, the defendant moved for a judgment notwithstanding the verdict and in the alternative for a new trial, specifying, among other errors of law, that the court had erred in denying the request of the defendant for leave to amend the answer to plead an alleged breach of the provisions of the policy by the plaintiff in encumbering the property covered by the policy, and also a failure to take an inventory of the stock alleged

to be covered by said policy, and to keep books of account detailing the purchases and sales of stock, and *to keep said inventory and books of account in an iron safe* during the hours plaintiff's store was closed for business, and in failing to keep an iron safe or any other protection for such inventory and books, by reason whereof the same were burned and were not produced at the trial; that the court erred in denying the offer of proof and in refusing to permit the defendant to prove that the plaintiff did not keep an iron safe or any other receptacle for its inventory and books of account, and that there had been a breach of the policy in this respect; that the court erred in denying a motion to direct a verdict for the defendant; that the court erred in instructing the jury that the only question in the case for their determination was whether or not the plaintiff paid the premium upon the policy. Thereafter the court set aside the verdict and ordered: "(1) Under the provisions of § 6883, Revised Codes of 1905, § 7482, Comp. Laws, 1913, that the answer be and the same is hereby amended to include the so-called 'iron safe' defensive matter, in the same form and to the same extent as though it had been permitted during the time of the trial, when requested, defendant being permitted at this time to prepare said amendment and file the same as a part of the record in this case. (2) That the motion to vacate and set aside the verdict and judgment heretofore rendered and filed in said action be and the same is hereby granted, and said judgment is hereby accordingly vacated and set aside. (3) That the judgment is entered against the plaintiff notwithstanding the verdict dismissing the action with costs." From this order and the judgment entered thereon the plaintiff has appealed, and asks this court that the district court be directed to reverse its order permitting the amended answer, vacating the judgment, and ordering judgment notwithstanding the verdict for a dismissal and for costs, and that the judgment of dismissal and for costs be reversed, and that the lower court be directed to enter judgment for the plaintiff, or reinstate the verdict and order for judgment and judgment thereon rendered for plaintiff.

Knauf & Knauf, for appellant.

It was error for the court to allow amended answer setting up an entirely new defense, after the trial had been closed and the case ended, because it came too late; because of the new defense and because at all

times but the one defense of nonpayment of the premium had been pleaded and relied upon during the entire case. *Maclaren v. Kramer*, 26 N. D. 244, 144 N. W. 85.

Especially is this true where it is sought by defendant to introduce upon the trial evidence of some new defense—a defense outside the issues—and objection is promptly made. In such case there is no abuse of discretion in denying leave to amend. *Mendenhall v. Harrisburg Water Power Co.* 27 Or. 38, 39 Pac. 399; *Walker v. O'Connell*, 59 Kan. 306, 52 Pac. 894; *Mares v. Wormington*, 8 N. D. 329, 79 N. W. 441; *Heegaard v. Dakota Loan & T. Co.* 3 S. D. 469, 54 N. W. 656; *Leggat v. Palmer*, 39 Mont. 302, 102 Pac. 327; 1 Enc. Pl. & Pr. note 5, p. 585, and cases cited; *Wood v. Pehrsson*, 21 N. D. 357, 130 N. W. 1010; 31 Cyc. 452 (iv) and additional citations under note 85.

If allowable at all, the amendment should have been made before the evidence was admitted. *Beard v. Tilgham*, 20 N. Y. Supp. 736, 31 Cyc. ¶ 4, p. 452; *Avegno v. Fosdick*, 28 La. Ann. 109; *Scott v. Smith*, 2 Kan. 438; *Texier v. Gouin*, 5 Duer, 389.

The defendant waived the alleged new defenses even though they were unknown. It could have discovered them before answering in the first instance had it duly prepared. Amendments are not allowed to give one party purely technical advantage over the other. *Skinner v. Norman*, 165 N. Y. 565, 80 Am. St. Rep. 776, 59 N. E. 309; Rev. Codes 1905, § 6883, Comp. Laws 1913, § 7482; *Hexter v. Schneider*, 14 Or. 184, 12 Pac. 668; *O'Toole v. Garvin*, 1 Hun, 313; *Chlein v. Kabat*, 72 Iowa, 291, 33 N. W. 771; *Seegers v. McCreery*, 41 S. C. 548, 19 S. E. 696; *Hiatt v. Auld*, 11 Kan. 176; *Riggs v. Chapin*, 27 N. Y. S. R. 268, 7 N. Y. Supp. 765.

After plaintiff has rested, it is error to permit amendments showing new defenses, which plaintiff is not prepared to meet. *Skagit R. & Lumber Co. v. Cole*, 2 Wash. 57, 25 Pac. 1077; *Ferguson v. Hannibal & St. J. R. Co.* 35 Mo. 452; *Spyker v. Hart*, 22 La. Ann. 534; *Iltis v. Chicago, M. & St. P. R. Co.* 40 Minn. 273, 41 N. W. 1040; *Garrison v. Goodale*, 23 Or. 307, 31 Pac. 709; *Athens Mut. Ins. Co. v. Ledford*, 134 Ga. 500, 68 S. E. 91; *Glazer v. Lowrie*, 8 Serg. & R. 498.

Plaintiff having demanded from the insurance company, soon after the fire, a set of proof of loss blanks, and the company falling to send same, plaintiff thereafter sent in proof of loss, which was retained by the

company without objection; it waived all insufficiency or irregularity. Rev. Codes 1905, §§ 5977, 5978, Comp. Laws 1913, §§ 6544, 6545; Angier v. Western Assur. Co. 10 S. D. 82, 66 Am. St. Rep. 685, 71 N. W. 761; 2 Bacon Ben. Soc. § 409, p. 1033; Hart v. Fraternal Alliance, 108 Wis. 490, 84 N. W. 851; Hutchinson v. Supreme Tent, K. M. 68 Hun, 355, 22 N. Y. Supp. 801; Stepp v. National Life & Maturity Asso. 37 S. C. 417, 16 S. E. 134.

Notice from the secretary is notice from the company. The company is bound by the acts of its secretary. Olmstead v. Farmers' Mut. F. Ins. Co. 50 Mich. 201, 15 N. W. 82.

Any affirmative defense must be specially pleaded. All defenses not set up in the answer are waived. Goodwin v. Massachusetts Mut. L. Ins. Co. 73 N. Y. 496; Brink v. Hanover F. Ins. Co. 80 N. Y. 113; Smith v. German Ins. Co. 107 Mich. 270, 30 L.R.A. 368, 65 N. W. 236.

Where defendant has particularly called attention of insured to its reason for refusal to pay for the loss, because of claimed failure to pay the premium, and, when sued, comes in and by its answer sets up this sole and only defense, it waives all other defenses. Continental Ins. Co. v. Waugh, 60 Neb. 348, 83 N. W. 81; Franklin F. Ins. Co. v. Chicago Ice Co. 36 Md. 102, 11 Am. Rep. 469; Home Ins. Co. v. Baltimore Warehouse Co. 93 U. S. 527, 547, 23 L. ed. 868, 870; Ohio & M. R. Co. v. McCarthy, 96 U. S. 258, 24 L. ed. 693.

A distinct denial of liability and refusal to pay a loss, on the ground that there is no contract, is a waiver of proofs of loss. Tayloe v. Merchants' F. Ins. Co. 9 How. 390, 403, 19 L. ed. 187, 192; Allegre v. Maryland Ins. Co. 6 Harr. & J. 408, 14 Am. Dec. 289; Norwich & N. Y. Transp. Co. v. Western Massachusetts Ins. Co. 34 Conn. 561; Thwing v. Great Western Ins. Co. 111 Mass. 93; Brink v. Hanover F. Ins. Co. 80 N. Y. 108; May, Ins. §§ 468, 469; Knickerbocker L. Ins. Co. v. Pendleton, 112 U. S. 696, 710, 28 L. ed. 866, 870, 5 Sup. Ct. Rep. 314; Covenant Mut. Ben. Asso. v. Spies, 114 Ill. 463, 2 N. E. 482; Grattan v. Metropolitan L. Ins. Co. 80 N. Y. 281, 36 Am. Rep. 617; Ætna Ins. Co. v. Shryer, 85 Ind. 362; Carson v. German Ins. Co. 62 Iowa, 433, 17 N. W. 650; Phoenix Ins. Co. v. Adams, 8 Ky. L. Rep. 532; Daul v. Firemen's Ins. Co. 35 La. Ann. 98; Home Ins. Co. v. Gaddis, 3 Ky. L. Rep. 159; Aurora F. & M. Ins. Co. v. Kranich, 36 Mich. 289; Rokes v. Amazon Ins. Co. 51 Md. 512, 34 Am. Rep. 323;

Planters' Ins. Co. v. Comfort, 50 Miss. 662; German-American Ins. Co. v. Davidson, 67 Ga. 11; Merchants' & M. Ins. Co. v. Vining, 68 Ga. 197; Goodwin v. Massachusetts Mut. L. Ins. Co. 73 N. Y. 480; Kantrener v. Penn Mut. L. Ins. Co. 5 Mo. App. 581; Marston v. Massachusetts L. Ins. Co. 59 N. H. 92; King v. Hekla F. Ins. Co. 58 Wis. 508, 17 N. W. 297; Zielke v. London Assur. Corp. 64 Wis. 442, 25 N. W. 436; Home Ins. Co. v. Baltimore Warehouse Co. 93 U. S. 546, 23 L. ed. 870; Payn v. Mutual Relief Soc. 6 N. Y. S. R. 365, 17 Abb. N. C. 53; Pennsylvania F. Ins. Co. v. Dougherty, 102 Pa. 568; Girard L. Ins. Annuity & T. Co. v. Mutual L. Ins. Co. 97 Pa. 15; Kansas Protective Union v. Whitt, 36 Kan. 760, 59 Am. Rep. 607, 14 Pac. 275; Lazensky v. Supreme Lodge, K. H. 31 Fed. 592; Norwich & N. Y. Transp. Co. v. Western Massachusetts Ins. Co. 34 Conn. 561; Kansas Protective Union v. Whitt, 36 Kan. 760, 59 Am. Rep. 607, 14 Pac. 275.

Plaintiff never consented to litigate issues other than those set out in the pleadings; therefore a request for a charge on another issue is properly refused. *Ganser v. Fireman's Fund Ins. Co.* 38 Minn. 74, 35 N. W. 584.

The clauses in an insurance policy covering the keeping of an "iron safe," "books of account," and "inventory," if relied to defeat the loss under the policy, must be specially pleaded in the answer, and then proved as facts, else they are waived. *Coburn v. Traveler's Ins. Co.* 145 Mass. 226, 13 N. E. 604; *Elliott v. Home Mut. Hail Asso.* 160 Iowa, 105, 140 N. W. 431; *Bohles v. Prudential Ins. Co.* 84 N. J. L. 315, 86 Atl. 438; *Queen of Arkansas Ins. Co. v. Forlines*, 94 Ark. 227, 126 S. W. 719.

Where the *actions* of an insurance company indicate one, certain, sole and only defense, other defenses are waived. *Walrod v. Des Moines F. Ins. Co.* 159 Iowa, 121, 140 N. W. 218; *Queen of Arkansas Ins. Co. v. Forlines*, 94 Ark. 227, 126 S. W. 719; *Syndicate Ins. Co. v. Catchings*, 104 Ala. 176, 16 So. 46; *Liverpool & L. & G. Ins. Co. v. Tillis*, 110 Ala. 201, 17 So. 672; *Georgia Home Ins. Co. v. Allen*, 119 Ala. 436, 24 So. 399; *Montgomery v. Montgomery Waterworks Co.* 77 Ala. 256; *Fire Ins. Cos. v. Felrath*, 77 Ala. 194, 54 Am. Rep. 58; *Central City Ins. Co. v. Oates*, 86 Ala. 558, 11 Am. St. Rep. 67, 6 So. 83;

1 Joyce, Ins. ¶¶ 425, 440, 591; Brink v. Hanover F. Ins. Co. 80 N. Y. 113.

Peirce, Tenneson & Cupler, attorneys for respondent.

Defendant assumed throughout the case, and until the testimony of the plaintiff himself, that plaintiff had complied with all the provisions of the policy, and that if the jury should find that he had paid the premium to the agent, there was no other defense. The company had no previous knowledge of any other breach of the policy. The fact that no inventory had been taken; that same and books of account had not been kept in an iron safe, as the policy provides, was unknown to the company, until disclosed by plaintiff on the witness stand. The amendment was therefore properly allowed. *North British & Mercantile Ins. Co. v. Rudy*, 26 Ind. App. 472, 60 N. E. 9; *Brock v. Des Moines Ins. Co.* 96 Iowa, 39, 64 N. W. 685; *Sweeney v. Johnson*, 23 Idaho, 530, 130 Pac. 997; *Emmons v. Home Ins. Co.* 1 Penn. (Del.) 83, 39 Atl. 775; *Southern Ins. Co. v. Hastings*, 64 Ark. 253, 41 S. W. 1093; *Burke v. Snell*, 42 Ark. 57; 2 Elliott, Ev. 920.

By plaintiff's own evidence he had shown that he was not entitled to a verdict, a prima facie case had not been made out, and there was no call for evidence from defendant. *Cooke v. Northern P. R. Co.* 22 N. D. 266, 133 N. W. 303.

Plaintiff alleged in his complaint that he had performed all the conditions of the policy. A general denial puts in issue this question of performance, without the necessity of alleging such conditions and their breach. *Sifton v. Sifton*, 5 N. D. 187, 65 N. W. 670; 9 Cyc. 600, 732.

Failure to move for or to accept a continuance is a waiver of an objection to the allowance of an amendment on the ground of surprise. 31 Cyc. 751, note 45; *Helbig v. Grays Harbor Electric Co.* 37 Wash. 130, 79 Pac. 612; *Straus v. Buchman*, 96 App. Div. 270, 89 N. Y. Supp. 226, affirmed in 184 N. Y. 545, 76 N. E. 1109.

The mere fact that the amendment constitutes a departure in pleading, or adds or substitutes a new or different cause of action in the strict sense of those terms, is no good reason for disallowing the amendment. *Rae v. Chicago, M. & St. P. R. Co.* 14 N. D. 507, 105 N. W. 721; *Kerr v. Grand Forks*, 15 N. D. 294, 107 N. W. 197; *Martin v. Luger Furniture Co.* 8 N. D. 220, 77 N. W. 1003; *Anderson v. First*

Nat. Bank, 5 N. D. 80, 64 N. W. 114; Webb v. Wegley, 19 N. D. 606, 125 N. W. 562.

A defendant has the right to set up any defense he may have, by way of amendment, and is not subject to the restrictive rule which prohibits a plaintiff from changing the form of his action from one *ex contractu* to one *ex delicto*. Plaintiff's right to recover is not effected by the form of the answer or nature of the defense. 1 Hayne, New Tr. & App. § 54, pp. 271, 272; Farmers' Nat. Gold Bank v. Stover, 60 Cal. 394.

Amendments are properly allowed after the commencement of the trial, after the evidence is introduced and after the judgment. 31 Cyc. 398-406.

An appellant will not be heard to urge on appeal that the cause was tried on defective pleadings, when the error was his own or was caused by granting his motion to strike out an allegation, or when the cause is tried as if the pleading contained the necessary averments. 4 Enc. L. & P. 346, 347; 3 Cyc. 244; Conley v. Dibber, 91 Ind. 413; Sanger v. Noonan, — Tex. Civ. App. —, 27 S. W. 1056; Parker v. Spencer, 61 Tex. 164; Texas & N. O. R. Co. v. Goldberg, 68 Tex. 687, 5 S. W. 824.

Where an offer of proof or to amend is made, and no objection is made to the method or form of the offer, objection in the appellate court cannot avail. 38 Cyc. 1335, notes 24 and 25; Biddick v. Kobler, 110 Cal. 191, 42 Pac. 578.

The iron-safe clause in the policy is proper and valid, and amounts to an express warranty. Rev. Codes 1905, §§ 5955-5957, 5959, 5960, Comp. Laws 1913, §§ 6522-6524, 6526, 6527.

To constitute an estoppel or waiver, the party against whom it is alleged must be shown to have had knowledge of all of the facts. Thompson v. Traveler's Ins. Co. 11 N. D. 274, 91 N. W. 75, 13 N. D. 444, 101 N. W. 900.

The burden of proving such knowledge is upon the plaintiff, the assured. 1 Clement, Fire Ins. 411, 418, 431, and citations; Wierengo v. American F. Ins. Co. 98 Mich. 621, 57 N. W. 833; Van Buren County v. American Surety Co. 137 Iowa, 490, 126 Am. St. Rep. 290, 115 N. W. 24.

The insurance company cannot waive that which it does not know. 1 Clement, Fire Ins. pp. 410, 436-438; Rundell v. Anchor F. Ins. Co. — Iowa, —, 101 N. W. 517; Welsh v. London Assur. Corp. 151 Pa.

607, 31 Am. St. Rep. 786, 25 Atl. 142; 1 Clement Fire Ins. 437; Findlay v. Union Mut. F. Ins. Co. 74 Vt. 211, 93 Am. St. Rep. 885, 52 Atl. 429; McCormick v. Royal Ins. Co. 163 Pa. 184, 29 Atl. 747; Cassimus Bros. v. Scottish Union & Nat. Ins. Co. 135 Ala. 256, 33 So. 163; Devens v. Mechanics' & T. Ins. Co. 83 N. Y. 168; Brink v. Hanover F. Ins. Co. 80 N. Y. 108; Ervay v. Fire Asso. of Philadelphia, 119 Iowa, 304, 93 N. W. 290; C. Shenkberg Co. v. Maloy, — S. D. —, 147 N. W. 286.

Further, the provision of the policy that any waiver of its provisions must be in writing indorsed on the policy is valid and binding as to conditions subsequent, such as the breach of the iron-safe clause. *Leisen v. St. Paul F. & M. Ins. Co.* 20 N. D. 316, 30 L.R.A.(N.S.) 539, 127 N. W. 837.

BRUCE, J. (after stating the facts as above). It is quite clear to us that the mere fact that, during the negotiations in regard to the loss, the defendant insurance company said nothing about the failure to maintain the safe and to keep the books therein, did not estop it from raising and interposing such a defense upon the trial and when it first learned of such failure. "The doctrine of waiver . . . should not be extended so as to deprive a party of his defense, merely because he negligently, incautiously, when a claim is first presented, while denying his liability, omits to disclose the ground of his defense, or states another ground than that upon which he finally relies. There must, in addition, be evidence from which the jury would be justified in finding that, with full knowledge of the facts, there was an intention to abandon, or not to insist upon, the particular defense afterward relied upon, or that it was purposely concealed under circumstances calculated to, and which actually did, mislead the other party to his injury." *Devens v. Mechanics' & T. Ins. Co.* 83 N. Y. 168. The record shows that until the trial the defendant was of the opinion that the insurance premium had never been paid, and there is no evidence whatever that it had any knowledge of the failure to keep the books in the safe until the fact had been disclosed upon the cross-examination. None of the numerous cases cited by counsel for appellant bear him out in his contention. All of them relate to formal proofs of loss which the courts held could not be insisted upon where the defendant insurance company had re-

pudiated the policy on other grounds, and had lulled the plaintiff into the belief that, even if such proofs were furnished, they would not be considered and would be unavailing. They are cases, indeed, where the plaintiff had been lulled into a sense of security, and had refrained from doing certain formal acts, and this on account of the actions of the insurance company. In the case at bar the failure to keep the books in the safe was a matter which went to the question of liability in the first instance. Either they had been kept in the safe or they had not; and no action on the part of the insurance company, after the occurrence of the fire, could, as far as this matter was concerned, have unduly affected the insured. We can, indeed, see no grounds for the application of the rules either of waiver or of estoppel. See chapter on Waiver and Estoppel, 14 Mod. Am. Law, 46; 1 Clement, Fire Ins. 410.

We are quite satisfied, however, that the learned trial court erred in granting the motion of the defendant for judgment notwithstanding the verdict, and allowing the filing of the amended answer after the rendition of the verdict and entry of the judgment, and in order to justify the granting of the motion. The law, indeed, is well established that the breach of a condition subsequent in an insurance policy must, in order to be relied upon, be specially pleaded, and the failure to keep the books of account in the iron safe was clearly a condition subsequent. The policy, in short, was operative when issued; and if the fire had taken place before any new goods were purchased or sales had been made, the clause in regard to the keeping of the books and the preserving them in an iron safe would have been in no way applicable. So far, too, as the inventory was concerned, the policy merely provided that it should be taken "at least once during the life" thereof, and as the fire happened within three months of the issuance of the policy, there appears to have been no violation of the terms of the instrument in failing to make the same. There was no attempt in the original answer to plead either of these defenses, and, as far as the original answer was concerned, they could therefore not be relied upon. See Cooley Briefs on the Law of Insurance, vol. 2, page 1176, and cases cited; Phillips, Code Pl. § 421; Bringham v. Leighty, 61 Ind. 524.

We are not unaware of the holding in *Sifton v. Sifton*, 5 N. D. 187, 65 N. W. 670, in which it was held that where the contract sued upon

imposed "certain conditions precedent to be performed on plaintiff's part, and the complaint alleged that 'the said plaintiff has fully performed all the conditions of said instrument on her part.' The answer embraced a general denial, . . . [such] answer raised a material issue of fact which defendant had a legal right to have presented to a jury for determination." We have to remember, however, that in the case at bar, the keeping of the books in the safe was a condition subsequent, and not a condition precedent.

So, too, the failure to keep the books in a safe was, in no event, a complete defense. The policy was divisible. By its terms the insurer agreed to pay \$500 in the case of the loss or destruction of the building, and \$2,000 in case of the loss of the contents. If the jury believed, as it evidently did, that the plaintiff had paid the premium on the insurance policy, the plaintiff was, at any rate, entitled to a recovery of \$500 for the loss of the building, as the provision in relation to the keeping of the books in an iron safe had no relation to such building. "But the iron-safe clause," says the supreme court of West Virginia, "relates only to the stock of merchandise, and noncompliance with it does not necessarily affect defendant's liability with respect to the other property insured. It was not intended to apply to the building itself, the household furniture, or the fixtures in the building, and notwithstanding the policy expressly provides that it shall be void and no action shall be maintained upon it if any of the warranties are violated, the rule established by the great weight of decisions is that, in the absence of fraud or any act condemned by public policy, the contract is divisible, and recovery may be had for the loss of other property not affected by the particular warranty broken. The risk as to the building, fixtures, and household furniture is in no wise increased by a failure to preserve an account of the mercantile transactions." *Fisher v. Sun Ins. Co.* 74 W. Va. 694, L.R.A.1915C, 619, 83 S. E. 729.

Although, indeed, there is a decided conflict of authority upon the proposition, and some courts hold that where the premium is paid in gross, the breach even of a condition which is strictly applicable to only one class of goods will invalidate the whole policy, the rule which is gaining ground and which seems to use to be more just and reasonable is that "where an insurance policy is issued, and different classes of property are insured, each class being separated from the others and

insured for a specific amount, and there is a breach of the conditions of the contract as to one class of the property insured, the contract should be considered as not one entire in itself, but as one which is severable, and in which the separate amounts specified may be distinguished, and a recovery had for one or more of them without regard to the other, provided the contract is not affected by any question of fraud, act condemned by public policy, or any increase of the risk of the company on the whole property insured because of the breach." *Miller v. Delaware Ins. Co.* 14 Okla. 81, 65 L.R.A. 173, 75 Pac. 1121, 2 Ann. Cas. 17, and cases cited; See also *Fisher v. Sun Ins. Co.* 74 W. Va. 694, L.R.A.1915C, 619, 83 S. E. 729, and cases cited. For general discussion of the proposition and also for authorities *contra*, see *Joffe v. Niagara F. Ins. Co.* 116 Md. 155, 81 Atl. 281, Ann. Cas. 1913C, 1217, and valuable note in 51 L.R.A.(N.S.) 1047; *Southern F. Ins. Co. v. Knight*, 111 Ga. 622, 52 L.R.A. 70, 78 Am. St. Rep. 216, 36 S. E. 821.

We are satisfied, also, that the learned trial judge did not err or commit an abuse of discretion in refusing to allow the filing of the amendment to the answer, and setting up this defense at the close of the plaintiff's case. It may be true that as a general rule a plaintiff cannot claim to be surprised by a defense, the facts which furnish the basis of which are within his own peculiar knowledge, and that in the case at bar plaintiff must have known of his own failure to keep the books in an iron safe. See *Southern Ins. Co. v. Hastings*, 64 Ark. 253, 41 S. W. 1093, 1094. The matter of allowing the amendment, however, was within the sound discretion of the trial court, and the practice is not favored which inverts the orderly modes of trial which generally prevail and settles issues after, instead of before, trial. 31 Cyc. 452; *Wood v. Pehrsson*, 21 N. D. 357, 130 N. W. 1010. It is also to be remembered that the motion was not made until the plaintiff had rested; that neither throughout the negotiations for a settlement nor in the original answer had the defendant in any manner suggested the defense; that the trial was held at a place more than a hundred miles from the home of the plaintiff and of his attorneys, and that, although the defendant now insists in its brief that it had no knowledge of the fact of the failure to keep the books in the safe until after the cross-examination of the plaintiff himself on the trial, no such statement was made to

the trial court, and no affidavit in support of such a proposition was filed, nor, as far as the record discloses, was any such showing in any other manner made. The trial court, therefore, was, as we have before said, clearly within the limits of his discretion, and committed no error in refusing to permit the amendment, and he could hardly, after the trial of the case had been completed and a verdict for the plaintiff had been returned upon the pleadings and the proof thereunder and which were before the jury and the court, change these issues, and set aside the verdict and order judgment for the defendant.

The introduction of the evidence as to the iron safe and the keeping of the books therein was strenuously objected to by counsel for plaintiff, on the ground that there was no foundation therefor in the pleading. The evidence, it is true, was admitted in spite of the objections, but later, and at the close of plaintiff's case, and when counsel for the defendant sought to amend his answer and to set up his defense, the motion was denied by the trial court. This action on the part of the trial court could only have been understood by the plaintiff as a repudiation of the defense on the part of such court, and the allowing of the evidence to stand merely as evidence which might tend to show the inaccuracy of the plaintiff and his lack of information in regard to the property actually burned, but not in any manner as decisive, or evidence which would tend to defeat the action altogether. "Respondent's counsel," says Mr. Justice Fisk, in speaking for this court in the case of *Maclaren v. Kramer*, 26 N. D. 244, 50 L.R.A.(N.S.) 714, 144 N. W. 85, "earnestly contend that, even though it be held that justification must be pleaded in order to be available as a defense, the allowance of the amended answer after the trial in which such justification is alleged renders plaintiff's point in this respect of no avail. In other words, it is contended that by the allowance of such amended answer defendant is in as advantageous a position as he would have been in had he pleaded such new matter in the original answer. We are unable to uphold respondent's contention in this respect. Had the testimony showing justification been introduced without objection, a different situation would arise, but as we understand the settled rule, while amendments to pleadings to conform to the proof will, in furtherance of justice, be liberally granted, they will never be granted where the admission of evidence was promptly objected to, when it was offered, upon

the ground that it did not tend to support the allegations in the pleadings."

The practice on motions for judgment notwithstanding the verdict is governed by § 7643, Compiled Laws 1913. This section, so far as it relates to the practice in the trial court, reads as follows: "In all cases where at the close of the testimony in the case tried, a motion is made by either party to the suit requesting the trial court to direct a verdict in favor of the party making such motion, which motion was denied, the trial court on motion made, that judgment be entered notwithstanding the verdict, or on motion for a new trial, shall order judgment to be entered in favor of the party who was entitled to have a verdict directed in his or its favor."

Under the provisions of this section, two prerequisites are essential to justify a trial court in ordering judgment notwithstanding the verdict: (1) A motion for a directed verdict must have been made and denied; (2) the party who moved for a directed verdict must have been entitled to a directed verdict at the time of the motion. The motion for judgment notwithstanding the verdict in effect reviews only the court's ruling in denying the motion for a directed verdict. If no motion for a directed verdict has been made, or if the motion for a directed verdict was properly denied, then a motion for judgment notwithstanding the verdict should not be granted. See *Johns v. Ruff*, 12 N. D. 74, 95 N. W. 440; *West v. Northern P. R. Co.* 13 N. D. 221, 231, 100 N. W. 254. In the case at bar the motion for a directed verdict was properly denied. At the time such motion was made and denied, the defense of the failure to keep the books in the safe was not an issue in the case. The only issue presented by the pleadings on which the motion could have been granted was that the plaintiff had not paid the premium, and on this there was a direct conflict in the testimony. Hence, the trial court's ruling in denying the motion for a directed verdict was correct. And this being so, the motion for judgment notwithstanding the verdict should, also, have been denied.

This being our view of the case, we have no option but to order a reversal of the judgment for the dismissal of the action, and to remand the case to the District Court, with directions to reinstate the verdict of the jury and to enter judgment for the plaintiff in accordance therewith. It is so ordered.

On Petition for Rehearing.

BRUCE, J. A petition for rehearing has been filed in this case, which asks for a rehearing, or, at any rate, for a modification of the decision. The petition, as far as it relates to the rehearing, largely restates the arguments presented in the original briefs and on the oral argument, and which we believe have already been sufficiently covered by us. The petition for a modification of the decision, however, presents a new question.

Counsel for appellant asserts that "the decision in this court must, in any event, be modified. The motion for new trial, assigning many errors of law and insufficiency of the evidence, was presented to the trial court, but not passed upon because of his decision in our favor on the motion for judgment notwithstanding the verdict. The case must, in accordance with the established practice, be remarked for further proceedings."

We have, however, carefully examined the record of the case and find that no errors of law were committed by the trial court which would have justified the granting of a new trial, and that the only issue which was presented by the pleadings, namely, the fact of the payment or the nonpayment of the premium, was properly submitted to the jury. Formal proof of loss prior to the trial was, of course, waived by the flat refusal of the company to pay the same on account of the alleged nonpayment of the premium. See § 5977, Rev. Codes 1905, § 6544, Compiled Laws of 1913; May, Ins. §§ 468, 469.

The controversy as to the payment or nonpayment of the premium was decided by the jury in favor of the plaintiff, and the only question, therefore, is whether *in furtherance of justice* the trial court should, at the close of plaintiff's testimony, have allowed an amendment to the pleadings permitting the setting up of the defense of the breach of the iron-safe clause and the provisions in regard to encumbrances or limitations of ownership, and therefore whether in the *furtherance of justice* the trial court, after the rendition of the verdict, should have ordered a new trial so that this might be done, and whether this court on this appeal should send the case back in order that these proceedings may be had. It is, of course, well established that the defendant has no right to such amendment; that such amendment would introduce entirely

new issues into the case, and that such amendments should only be allowed in the sound discretion of the court, and are never allowed except in the furtherance of justice.

In the case at bar there can be no doubt that when the trial judge refused the amendment on the trial, he committed no abuse of discretion. Defendant, it is true, insists that such judge knew, and was informed upon the motion for judgment notwithstanding the verdict, that the defendant only became aware of the failure of the plaintiff to keep the iron safe upon the cross-examination of the plaintiff. There is nothing, however, in the record to bear out this statement. The record, as far as proof is concerned, is entirely silent on this proposition, and even if, on the motion for judgment notwithstanding the verdict, the trial court was of that opinion, it by no means follows that at the time the amendment was asked on the trial, he had any such belief, or that there was in the evidence proof in support thereof. The only defense that the defendant had interposed was that of nonpayment of the premium. In all of its letters it had insisted upon this defense and on this defense alone. Although we held in the principal opinion that the failure to mention this defense in the letters did not preclude it from pleading the same when sued upon the policy, we stopped far short of holding that this fact might not be considered by the trial court in refusing, in the exercise of its sound discretion and in furtherance of justice, to allow an amendment of the pleadings setting up the same, and when such amendment was not asked for until after the close of plaintiff's case, and this court must consider the fact in passing upon the question of whether in furtherance of justice it itself should send the case back so that a new trial may be granted and the amendment allowed.

Section 7482 of the Compiled Laws of 1913 only permits such amendments when "in the furtherance of justice." The purpose of the iron-safe clause is merely to serve as a safeguard against the padding of accounts and the claim of a greater loss than has actually occurred. Here the policy was only for \$2,500, and the proof is positive and uncontradicted that the loss was over \$5,000, and we are asked to send the case back for a new trial in order to allow to be interposed what, under the peculiar facts of the case, would be merely a technical defense, and when the uncontradicted proof shows that not only has there been

no padding of accounts, but the recovery of the plaintiff has only been for one half of his actual loss, and when, as a matter of fact, on account of the peculiar nature of the goods destroyed and the fact that the goods consisted principally of farm machinery, largely composed of metal which does not burn, it lay within the power of the defendant company, if it had chosen to investigate the loss, to have largely acquainted itself with the real extent of such loss. The skeletons of the machinery, in short, would have been strong proof of the existence of the original article.

The proof, too, is uncontradicted that the defendants at no time asked for any invoices or books of account, and we have no reason to believe that if they had been forthcoming, defendant would have in any way profited thereby.

We have carefully examined the case of *Nelson v. Grondahl*, 13 N. D. 363, 100 N. W. 1093, which is cited by counsel for appellant. In that case, however, there was a valid reason for a new trial on the record as presented to the supreme court and to the trial judge on the motion for judgment notwithstanding the verdict, and in the alternative for a new trial. In other words, a question had been taken from the jury which should have been submitted to it *under the pleadings*, and there was no question that the court had erred in directing a verdict and in not having this question so submitted.

The petition for a rehearing is denied.

STATE OF NORTH DAKOTA v. JOHN MILLER, also Known as
Janko Kazuta.

Opinion filed February 9, 1916.

Appeal from District Court of Bottineau County, *Burr, J.*

John Miller was convicted of crime and appeals.

Appeal dismissed.

Mockler & Ulness, for appellant.

Henry J. Linde, Attorney General, and *H. R. Bitzing*, Assistant Attorney General, for the State.

PER CURIAM. The respondent, pursuant to notice, has moved for a dismissal of the appeal for want of prosecution. The judgment of conviction was entered on December 5, 1914. Subsequently an appeal was taken therefrom, and the record on appeal duly transmitted to this court. No brief has been served or filed in behalf of the appellant, and no further proceedings taken by appellant.

The record transmitted to this court consists of copies of the information, the court's instructions, and the verdict and judgment of conviction, and a transcript of the minutes of the trial. No statement of the case has been settled. The only errors that could possibly be assigned on this appeal would have to be predicated on the record before us. In view of the serious offense of which defendant was convicted, all the members of this court have carefully examined and considered the record transmitted to this court. The minutes of the trial show that no ruling was invoked or made on any motion or demurrer; that defendant entered a plea of not guilty and was defended by able counsel; that a verdict of guilty was returned and defendant sentenced pursuant to the verdict. The verdict and sentence are clearly unassailable; and the court's instructions are free from prejudicial error, and eminently fair to the defendant. We are all agreed that no prejudicial error could be predicated on the record before us; and as no sufficient excuse has been shown for the failure to prosecute the appeal, the same will be dismissed.

It is so ordered.

E. Y. SARLES, Acting in His Own Behalf and All Those Similarly Situated, v. SCANDINAVIAN AMERICAN BANK & NORTHWESTERN TRUST COMPANY, of Grand Forks, North Dakota, and Ingeman & Company, a Corporation.

(156 N. W. 556.)

Action by minority stockholder to enjoin the directors of two affiliated banking institutions from proceeding with the erection of a five-story, fire-proof building upon the grounds that the investment exceeds 30 per cent of their

capital stock and unimpaired surplus as prescribed by § 5151, Comp. Laws 1913.

Minority stockholder — action by — directors — injunction — capital stock — surplus — evidence — sale — bona fide transaction.

1. Evidence examined and, *held*, that the sale of a certain lot by said institutions to one Reid is bona fide.

Undivided profits — use of — capital stock — unimpaired surplus — banking building.

2. Section 5151, Comp. Laws 1913, does not prohibit the use of the undivided profits in the aid of the 30 per cent of the capital stock and unimpaired surplus for the erection of such banking building.

Opinion filed December 29, 1915.

Appeal from the District Court of Grand Forks County, *Cooley, J.*
Affirmed.

George A. Bangs and *George R. Robbins*, for appellant.

The plaintiff, a minority stockholder in the corporations, defendants, has the right to maintain this action and to the injunctive relief asked. 10 Cyc. 968, 985, 986; 2 High, Inj. §§ 1203-1205, 1207; 3 Pom. Eq. Jur. 3d ed. 1093; 2 Clark & M. Corp. 539, pp. 1667-1673; 4 Thomp. Corp. § 4502; 5 Thomp. Corp. § 5693; *Stewart v. Erie & W. Transp. Co.* 17 Minn. 372, Gil. 375; *Dodge v. Woolsey*, 18 How. 331, 341, 15 L. ed. 401, 404; *Manderson v. Commercial Bank*, 28 Pa. 379; *Dunbar v. American Teleph. & Teleg. Co.* 224 Ill. 9, 115 Am. St. Rep. 132, 79 N. E. 423, 8 Ann. Cas. 57; *Pratt v. Pratt, R. & Co.* 33 Conn. 446; *Northern Trust Co. v. Snyder*, 113 Wis. 516, 90 Am. St. Rep. 867, 89 N. W. 460; *Byrne v. Schuyler Electric Mfg. Co.* 65 Conn. 336, 28 L.R.A. 304, 31 Atl. 833; *Knapp v. Supreme Commandery, U. O. G. C.* 121 Tenn. 212, 118 S. W. 390.

The state banking law was taken from the national banking law, largely. Comp. Laws 1913, §§ 5146 et seq.; U. S. Rev. Stat. § 5133, Comp. Stat. 1913, § 9658; *State v. Scougal*, 3 S. D. 55, 15 L.R.A. 477, 44 Am. St. Rep. 756, 51 N. W. 858; *State v. Richcreek*, 167 Ind. 217, 5 L.R.A.(N.S.) 874, 119 Am. St. Rep. 491, 77 N. E. 1085, 10 Ann. Cas. 899; *Weed v. Bergh*, 141 Wis. 569, 25 L.R.A.(N.S.) 1217, 124 N. W. 664.

Congress has no inherent power to create corporations, but the bank-

ing law is sustained as a means to accomplish a result or end within the power of Congress. *M'Culloch v. Maryland*, 4 Wheat. 316, 4 L. ed. 579; *Osborn v. Bank of United States*, 9 Wheat. 738, 6 L. ed. 204; *Farmers' & M. Nat. Bank v. Dearing*, 91 U. S. 29, 23 L. ed. 196.

The state has power to create and provide for the creation of corporations, and under police power may forbid individuals to engage in banking, and require such business to be done by corporations. *State ex rel. Goodsill v. Woodmansee*, 1 N. D. 246, 11 L.R.A. 420, 46 N. W. 970; *Weed v. Bergh*, 141 Wis. 569, 25 L.R.A.(N.S.) 1217, 124 N. W. 664; *Brady v. Mattern*, 125 Iowa, 158, 106 Am. St. Rep. 291, 100 N. W. 358.

Banking associations formed under our statute have power to purchase, hold, and convey real estate for limited purposes and time. *Comp. Laws 1913*, § 5151; *U. S. Rev. Stat. § 5137*, *Comp. Stat. 1913*, § 9674; *First Presby. Church v. National State Bank*, 57 N. J. L. 27, 29 Atl. 320, affirmed in 58 N. J. L. 406, 36 Atl. 1129; *Brown v. Schleier* (8th C.) 55 C. C. A. 475, 118 Fed. 981, affirmed in 194 U. S. 18, 48 L. ed. 857, 24 Sup. Ct. Rep. 558; *Weeks v. International Trust Co.* 60 C. C. A. 236, 125 Fed. 373; *Wingert v. First Nat. Bank*, 99 C. C. A. 315, 175 Fed. 739; *Farmers' Deposit Nat. Bank v. Western Pennsylvania Fuel Co.* 215 Pa. 115, 114 Am. St. Rep. 949, 64 Atl. 374; *First Nat. Bank v. Com.* 143 Ky. 816, 34 L.R.A.(N.S.) 54, 137 S. W. 518, *Ann. Cas. 1912D*, 378; *Union Nat. Bank v. Matthews*, 98 U. S. 621, 25 L. ed. 188.

Banking corporations cannot loan to any one person any amount in excess of that allowed by statute. Neither can they invest in buildings more, or any greater sum, than that allowed by statute. The statute law is their fixed and definite guide. *Comp. Laws 1913*, §§ 5151, 5172; *Briggs v. Spaulding*, 141 U. S. 132, 35 L. ed. 662, 11 Sup. Ct. Rep. 924; *Thompson v. Sioux Falls Nat. Bank*, 150 U. S. 231, 37 L. ed. 1063, 14 Sup. Ct. Rep. 94; *Union Gold-Min. Co. v. Rocky Mountain Nat. Bank*, 96 U. S. 640, 24 L. ed. 648, 1 Mor. Min. Rep. 432; *O'Hare v. Second Nat. Bank*, 77 Pa. 96.

There is a distinction between capital and capital stock of a corporation. The capital of the corporation is the property or means which the corporation owns, and it may vary in amount while the capital stock

is fixed and represents the interest of the stockholder and is their property. *Wells v. Green Bay & M. Canal Co.* 90 Wis. 452, 64 N. W. 72.

Bangs, Netcher, & Hamilton, for respondents.

"Capital stock, the sum fixed by the corporate charter as the amount paid in, or to be paid in, by the stockholders, for the benefit of corporate creditors." 6 Cyc. 348.

A bank has general inherent power and right to erect and maintain suitable quarters, and to contract for and lease suitable sites, for the accommodation of its business. *Brown v. Schleier*, 55 C. C. A. 475, 118 Fed. 981, affirmed in 194 U. S. 18, 48 L. ed. 857, 24 Sup. Ct. Rep. 558; *Farmers' Deposit Nat. Bank v. Western Pennsylvania Fuel Co.* 215 Pa. 115, 114 Am. St. Rep. 949, 64 Atl. 374; *Wingert v. First Nat. Bank*, 99 C. C. A. 315, 175 Fed. 739; *Weeks v. International Trust Co.* 60 C. C. A. 236, 125 Fed. 373; *Banks v. Poitiaux*, 3 Rand. (Va.) 136, 15 Am. Dec. 709; *Noble State Bank v. Haskell*, 22 Okla. 48, 97 Pac. 605.

A stockholder has no right or claim to a dividend or to undivided profits, until same is regularly declared; until that time the earnings belong to the corporation, and, in the absence of fraud, may be handled or disposed of according to the honest judgment of the managing officers and directors. *Minot v. Paine*, 99 Mass. 106, 96 Am. Dec. 705; *Gibbons v. Mahon*, 136 U. S. 549, 558, 34 L. ed. 525, 527, 10 Sup. Ct. Rep. 1057; *Williams v. Western U. Tele. Co.* 93 N. Y. 187; *Garland v. Rives*, 15 Am. Dec. 762, note; *Barry v. Merchants' Exchange Co.* 1 Sandf. Ch. 304.

"The word 'capital' applied to corporations is often used interchangeably with the words 'capital stock,' and both are frequently used to express the same thing,—the property and assets of the corporation." 10 Cyc. 364, 365; *Christensen v. Eno*, 106 N. Y. 97, 60 Am. Rep. 429, 12 N. E. 648; 6 Cyc. 348.

BURKE, J. The Scandinavian American Bank and the Northwestern Trust Company are financial institutions organized under the state laws, and located at Grand Forks. Upon their organization they were affiliated in the following manner: The shareholders are identical, each owning stock in the proportion of one share in the trust company and two shares in the bank. The plaintiff owns $8\frac{2}{3}$ per cent of the stock of

each corporation. In the spring of 1912 the directors had decided upon the erection of a five-story fire-proof building, 90' x 100', and had purchased a suitable lot. In 1914 the directors adopted plans for such building and ascertained that the completed and furnished building would cost approximately \$160,000, exclusive of the site. Plaintiff vigorously protested against the expenditure of so large a sum for building purposes and made several ineffectual efforts to call a meeting of the stockholders to discuss the matter. As a large majority of the stockholders favored the erection of the building, no meeting was held, but plaintiff gave timely notice through a written protest. At said time the bank had a capital of \$200,000; the trust company, a capital of \$100,000; the bank had \$80,000 surplus, and the trust company had \$20,000 surplus, making a total of \$400,000 capital and surplus, of which under § 5151, Comp. Laws 1913, said corporation was allowed to spend 30 per cent for banking house, furniture, fixtures, and land upon which the building is located. In addition to the capital and surplus the bank had \$26,360.56 and the trust company, \$16,895.34 undivided profits, a total of \$43,255.90, and at the same time the bank had \$11,000, and the trust company, \$6,000, nonledger assets. If 30 per cent of the capital and surplus be added to the undivided profits of both institutions, we have \$163,255.90,—more than the cost of the building alone. About this time the directors of the affiliated institutions sold the lot to one Hugh Reid, a stockholder and director of both companies, for the consideration of \$60,000, and he in turn leased said lot to the affiliated corporations for ninety-nine years, giving the said institutions an option to purchase said lot at any time within twenty years, upon payment of the amount of money which he had invested with interest. Provisions were further made for the payment of rental in the interim. The first dispute arises over this transaction. Plaintiff insists that this was a mere subterfuge and an evasion of the law. That there was, in fact, no sale, but that the bank continued to be the real owner of the lot. The defendant, on the other hand, insists that the sale was bona fide although made to reduce the investment to comply with § 5151, Comp. Laws 1913, aforesaid. This dispute will be considered and decided in paragraph 1 of this opinion. The other questions involve an interpretation of § 5151, Comp. Laws 1913, and principally whether the institutions can spend their undivided profits upon the

building in addition to the 30 per cent of the capital stock and surplus. This will be treated in paragraph 2.

(1) While this is a trial *de novo*, we do not feel called upon to reproduce any large portion of the evidence, but will content ourselves with announcing our findings of fact upon a very abbreviated *résumé* of the evidence. As we have already stated, this lot was bought in 1912 for \$60,000, of which \$30,000 had been paid and upon which \$30,000 was still owing. Plaintiff declares: "We believe the entire transaction is a bald, naked sham; that it was not entered into in good faith, and that it is a mere paper transaction,—a subterfuge; that the bank yet remains the owner of the real estate and that Reid has not now, and never has had, any interest therein."

When it comes to the proof, however, we find nothing tangible supporting this declaration. The officers of the bank and trust company and Mr. Reid were the only witnesses called. Their testimony is to the effect that in order to reduce the investment in the building to less than \$160,000 it had been decided to sell the lot; that thereupon a sale was made to Reid, who assumed the \$30,000 indebtedness upon the lot and gave his note to the bank for the other \$30,000; that said note was later renewed and sold to the First National Bank of Minneapolis and the money received by the defendant bank; that a written lease of the lot was executed between Reid and the defendants, which lease contained an option to purchase within twenty years upon paying to Reid the amount of his investment, with interest. No evidence was offered to contradict this testimony, but upon cross-examination it was shown that Reid was a director in both the bank and trust company, and that there were many circumstances going to show a very close relationship between Reid and the other directors. It was also established that at the time of the trial Reid had not reimbursed the bank for interest advanced by them for him, but it was to be taken care of later by him. We agree with plaintiff that the sale was a friendly arrangement, and that there was an understanding that the bank could repurchase the lot as soon as its capital and surplus made the transaction legal. In fact, the defendants do not seriously deny this situation themselves. Nevertheless, the bank's investment was actually reduced \$30,000 by the sale of their equity in the lot to Reid. The undisputed evidence shows that they have the money and that Reid has the lot. Upon the whole

we are satisfied that there was a sale; that Reid now owns the lot, and the bank has the money, and that, therefore, the amount of the bank's investment is less than \$160,000. It must be kept in mind that this action presents different questions than would one brought by the bank examiner in an effort to punish the institutions for a violation of law. Plaintiff is a minority stockholder. His principal grievance is the manner of using his capital and prospective dividends. He does not claim insolvency of the institutions. It is too clear for argument that this court cannot interfere in the management of the business affairs of a banking corporation. It is practically conceded that the officers of the bank and trust company believed the old quarters inadequate; that they could not be enlarged in the old building; that, in the judgment of said directors, the erection of a new building would greatly increase the business of the institutions, and that in their best judgment the erection of a building was a good business venture. It is our conclusion that the sale of the lot was bona fide.

(2) This brings us to the consideration of the second proposition, involving the right of the corporations to expend their undivided profits upon this venture. Section 5151, Comp. Laws 1913, reads: "It shall be unlawful for any corporation having banking powers and a capital stock of \$20,000 or more, to invest over 30 per cent of such stock and unimpaired surplus in banking house, furniture, and fixtures, including the lot, piece, or parcel of land on which such banking house is located. . . ." Appellant contends that § 5151, supra, places a positive limitation upon the expenditures from any source whatever, while the defendants maintain that they may invest the 30 per cent of the capital stock and unimpaired surplus, and in addition any reasonable amount of its undivided profits or nonledger assets. In discussing this question we must remember that this action is not brought by the bank examiner to punish the bank for violation of law, nor is it an action for a receiver instituted by the stockholder who believes the institution has been mismanaged.

We must also remember that § 5151 was doubtlessly enacted to insure the solvency of financial institutions, thus protecting depositors, and to keep 70 per cent of the capital and surplus of the bank intact for legitimate banking needs. The rights of the minority stockholders are protected by other provisions of the Code. It is also well to remember

that there is a sharp distinction between undivided profits and surplus. Surplus, like the capital stock, constitutes the working capital of the bank, and is, in addition, a fund for the protection of depositors. The undivided profits, on the contrary, is a temporary fund changing in size from day to day and carried only until dividend periods, when it is distributed to the stockholders or transferred to the permanent surplus. It is the fund from which the expenses and losses of the bank are paid. It is also well to remember that the interests of the stockholder and of the depositors in a mild manner clash upon the distribution of such profits. If the dividends are paid out to the stockholders they become lost to the corporation, while, if no dividends are declared, and the fund is transferred to the permanent surplus or invested in property belonging to the bank, the institution is strengthened. Thus the use of the \$43,255.90, undivided profits, of the bank and trust company for building purposes, increased the assets of the bank in practically that amount. It also must be remembered that the bank examiner is making no complaint of the management of this institution, and is not a party to this action. In other words, plaintiff is dissatisfied with the management of the affairs of those financial institutions.

Keeping all those things in mind, we approach the question in dispute, does § 5151 prohibit the use of the undivided profits of the bank in the erection of a building? Said section prohibits the use of more than 30 per cent of the capital stock and unimpaired surplus for such purposes. It does not contain any prohibition upon the use of the undivided profits or nonledger assets for that purpose. We cannot say that the use of the undivided profits of those institutions in the erection of a building is calculated to injure that institution in any manner. Certainly it does no more harm than to distribute said fund as dividend. There is, therefore, no reason why the legislature should desire to prohibit the return of those prospective dividends to the assets of the bank. Being no law against said use and no reason for a law, it is easy for us to determine that such acts are not forbidden by said section. We so hold.

It is too clear for argument that courts will not interfere with the private management of corporations unless some violation of law is charged. When the stockholders organized those corporations they delegated to those directors the management of the funds within the

limits prescribed by law. Among those powers conferred upon the directors was the distribution of the undivided profits. Such directors can distribute the funds as dividend, place it in the permanent surplus or expend it for betterments. So long as they do not act fraudulently in so doing there is no reason to disturb their action. It is practically conceded that the directors in the case at bar are acting for what they consider the best interests of the bank, and it must be conceded that their action does not in any way impair the financial standing of said institutions.

It is our conclusion upon the whole that the allied corporations have not used to exceed 30 per cent of their capital stock and unimpaired surplus in the erection of this building and the fixtures and furniture; that they had a right to use their undivided profits upon the same building; and, therefore, the total investment of the bank in this enterprise is within the limit established by law. *Barry v. Merchants' Exch. Co.* 1 Sandf. Ch. 280; 6 Cyc. 348; *Brown v. Schleier*, 55 C. C. A. 475, 118 Fed. 981, affirmed in 194 U. S. 18, 48 L. ed. 857, 24 Sup. Ct. Rep. 558; *Noble State Bank v. Haskell*, 22 Okla. 48, 97 Pac. 605; *Banks v. Poitiaux*, 3 Rand. (Va.) 136, 15 Am. Dec. 709; *Minot v. Paine*, 99 Mass. 101, 96 Am. Dec. 705; *Gibbons v. Mahon*, 136 U. S. 549, 34 L. ed. 525, 10 Sup. Ct. Rep. 1057; *Williams v. Western U. Teleg. Co.* 93 N. Y. 162; *Garland v. Rives*, 15 Am. Dec. 762, note; 10 Cyc. 364, 365, 1155.

Judgment of the trial court is affirmed.

FISK, Ch. J. (concurring): I concur in the result announced in the majority opinion, and I fully concur in what is said as to the construction of § 5151 of the Compiled Laws; but as to the issue of fact involving the question of the bona fides of the transaction whereby the title to the lots was transferred to Reid and a ninety-nine year lease taken back to the bank and trust company, I am not prepared to concur in all that is said by my associates. I have read with care the testimony relating to such transaction, and I am convinced that there is much merit in appellant's contentions. However, I find it unnecessary to question the motives or the alleged good faith of the officers and directors in consummating such deal. They, no doubt, honestly believe

that by clothing the transaction in the garb of legal formality they could satisfy the mandate of the statute.

As I view it, the transaction not only as to this appellant, but as to the corporations and their creditors, is, regardless of the motives or the good or bad faith of those directly instrumental in negotiating and perfecting the deal, valid and binding. In other words, as to the appellant, as well as all persons concerned, the transaction will be treated, both at law and in equity, as a legal and binding one, and the validity thereof cannot be questioned either by Reid or by the corporations. The state possibly might do so, but I fail to see how a minority stockholder can successfully question it without first showing a threatened injury to his rights. And how can he be injured in his rights when, as to him, the transaction, even though intended to be in legal form merely, is in substance and effect valid and binding. In so far as appellant is concerned, Reid is the owner of these lots, and not the corporations, and the leasing contract cannot be questioned as to its legal and binding effect. Therefore appellant is in a court of equity asking for relief which he already has by virtue of the facts aforesaid. The injunction prayed for was properly denied.

ALLEN PERSON v. JOHN MATTSON.

(156 N. W. 780.)

Suit to foreclose a mortgage securing notes for \$4,000 bearing interest at 12 per cent, nonusurious on their face. In part these two notes were renewals of two prior notes of \$356 and \$966 with cash advanced sufficient to aggregate \$4,000 for which the two notes were taken with security as one transaction. The \$356 note contained a usurious charge of bonus of \$45, and drew 12 per cent interest. No deduction for or purging of said usury was made by the parties when the \$4,000 in notes were taken, but the usurious amount was included in them. Defendant pleads usury, and demands that all the interest on the \$4,000 be forfeited and remitted under the usury statute.

33 N. D.—4.

The trial court deducted the interest on and bonus in the \$356 note, but allowed interest on the balance of the \$4,000.

Held:—

Usury statute—promissory notes—mortgage—pleading usury.

1. The principal of two notes aggregating \$4,000 is tainted with usury through that contained in the \$356 note entering into them as a portion of the purported principal of said notes.

Usury—interest—forfeiture of—promissory notes—bills.

2. The usury statute, § 6076, Comp. Laws 1913, providing that the taking of usury "shall be deemed a forfeiture of the entire interest which the note, bill, or other evidence of debt carries with it or which has been agreed to be paid thereon," mandatorily requires the penalizing of usury and the forfeiture of all the interest "agreed to be paid" on these two notes.

Court of equity—usury—relief from—statutory penalty—enforcing.

3. A court of equity should not relieve the usurer from the results of his contract for usury, but should enforce the statutory penalty for *exacting usury*.

Note—usury—nonusurious—separation—renewal note—usurious—interest—allowance of.

4. With usury proved in a note sued upon, a court cannot and should not separate the nonusurious from the usurious transactions incorporated by renewal into an usurious note, so as to allow interest on the nonusurious portion.

Usurious contract—parties to—may purge it of usury—by agreement—court—law—equity—powers of—in such cases—after suit brought—defense of usury.

5. The parties to an usurious contract themselves by agreement may purge it of usury, but a court of law or equity cannot do so after suit brought and after a defense of usury is interposed.

Usury statute—national banking act—interest—discount—uniformity.

6. Our usury statute was adopted from the national banking act governing taking of interest and discount by national banks, exempt in such respect from state laws; and was adopted to secure uniformity as to all banks, state and national, as to usury and penalty therefor. Federal decisions on usury are followed.

Usurious interest—forfeiture of—statute—enforcement of—penalty.

7. All usurious interest stipulated for should be forfeited. The usurious contract rate cannot be treated as invalid and not a contract for an interest rate, and interest at the noncontract rate of 6 per cent be allowed. To do so

would be to ignore and override the statutory penalty requiring forfeiture of all interest "agreed to be paid" on the notes.

Opinion filed February 4, 1916.

Appeal from the judgment of the District Court of Divide County, Leighton, J.

Modified, with costs on appeal to appellant.

C. E. Bruce and *E. R. Sinkler*, for appellant.

In cases where usury has been charged and not paid, and the usurer brings an action upon his contract, the illegality of the contract may be alleged as a defense, and if established, the entire interest due upon the contract becomes forfeited, and no recovery can be had upon contract except the principal sum. *Waldner v. Bowden State Bank*, 13 N. D. 604, 102 N. W. 169, 3 Ann. Cas. 847; *Grove v. Great Northern Loan Co.* 17 N. D. 359, 138 Am. St. Rep. 707, 116 N. W. 345; *Male v. Wink*, 61 Neb. 748, 86 N. W. 472; *Estey v. Capitol Invest. Bldg. & L. Asso.* 131 Mich. 502, 91 N. W. 753; *Tomblin v. Higgins*, 58 Neb. 336, 78 N. W. 620; *Arnold v. MacDonald*, 22 Tex. Civ. App. 487, 55 S. W. 529; *First Nat. Bank v. McCarthy*, 18 S. D. 218, 100 N. W. 14; *Exley v. Berryhill*, 37 Minn. 182, 33 N. W. 567; *Moncure v. Dermott*, 13 Pet. 345, 10 L. ed. 193.

Where the taint of usury has once attached to a contract, it cannot be removed by the introduction of new elements of a purer nature. *Marsh v. Robeno*, 5 Phila. 190.

A note given in renewal of a usurious note is also usurious. *El Paso Bldg. & L. Asso. v. Lane*, 81 Tex. 369, 17 S. W. 77; *McDonald v. Aufdengarten*, 41 Neb. 40, 59 N. W. 765; *Knox v. Williams*, 24 Neb. 630, 8 Am. St. Rep. 220, 39 N. W. 787; *Nelson v. Hurford*, 11 Neb. 465, 9 N. W. 649; *Walker v. Bank of Washington*, 3 How. 62, 11 L. ed. 494; *Judy v. Gerard*, 4 McLean, 360, Fed. Cas. No. 7,571; *Fslava v. Crampton*, 61 Ala. 507; *Bailey v. Lumpkin*, 1 Ga. 392.

Where notes are tainted with usury their renewal and adding the usury into the notes will not free the renewal notes from the taint. *House v. Davis*, 60 Ill. 367; *Rudd v. Planters' Bank*, 78 Ky. 513; *Smith v. Stoddard*, 10 Mich. 148, 81 Am. Dec. 778; *Grove v. Great Northern Loan Co.* 17 N. D. 359, 138 Am. St. Rep. 707, 116 N. W.

345; *Citizens' Nat. Bank v. Donnell*, 172 Mo. 384, 72 S. W. 925; 195 U. S. 372, 49 L. ed. 239, 25 Sup. Ct. Rep. 49; *Lockwood v. Muhlberg*, 124 Ga. 660, 53 S. E. 92.

F. A. Leonard and D. C. Greenleaf, for respondents.

Where one of two separate and independent loans is usurious, the taint does not adhere to the other, although both were between the same parties, closed at the same time and secured by the same mortgage. *Jackson v. May*, 28 Ill. App. 305; 39 Cyc. 990, 996, 998.

If a new obligation is given in which are incorporated the original usurious indebtedness, the new obligation is not tainted with the original usury. *German Ins. Co. v. Fabel*, 24 Ky. L. Rep. 1721, 72 S. W. 329; *McCraney v. Alden*, 46 Barb. 272; 29 Am. & Eng. Enc. Law, 518; *Citizens' Nat. Bank v. Donnell*, 195 U. S. 369, 49 L. ed. 240, 25 Sup. Ct. Rep. 49; *Rice v. Howland*, 147 Mass. 407, 18 N. E. 229.

Goss, J. This is a suit in equity to foreclose a chattel mortgage securing two promissory notes of \$2,000 each, bearing interest at 12 per cent per annum, nonusurious on their face. The appeal is taken upon the findings of fact, which accordingly are accepted as true. The only questions presented are those of law. The consideration for the notes sued upon consisted of two notes bearing 12 per cent interest, one for \$356 and the other for \$966, together with cash advanced sufficient to make the total of \$4,000 at the time the notes in suit were taken. The \$356 note was admittedly usurious, being a renewal of an earlier usurious note. The usury in the original note and the \$356 note amounted to \$45 over and above the 12 per cent per annum exacted. The \$966 note was an independent transaction and free from usury. And except for the usury contained in the \$356 note and interest thereon entering into the two notes for \$2,000 each, said notes are nonusurious. The questions of law presented concern the effect of the usurious note upon said notes in suit. Plaintiff asserts that the \$356 note should be treated as one transaction, and, from the total amount due on the \$4,000 and interest at 12 per cent, there should be deducted the \$45 bonus therein and all interest collected on the original \$330 note and accrued on the \$356 note, and a *pro rata* deduction of 12 per cent interest on the amount of the \$356 included in the \$4,000 transaction, altogether amounting to a deduction of \$218.35 from the face and interest of the two \$2,000 notes, and that foreclosure be had for the balance of the principal and interest

on said notes. And this was the relief granted by the trial court. The appellant claims that, by including the usurious note for \$356 in and as a part of the consideration of the notes for \$4,000 given as one transaction, both of said \$2,000 notes thereby became tainted with usury, and under the statute, § 6076, Comp. Laws 1913, providing that the taking of usury "shall be deemed a forfeiture of the entire interest which the note, bill, or other evidence of debt carries with it, or which has been agreed to be paid thereon," the entire interest on \$4,000 is forfeited on these two notes in suit.

Our present usury statutes are largely but re-enactments of the national banking act, defining usury and penalizing its taking by national banks, U. S. Rev. Stat. §§ 5197, 5198, Comp. Stat. 1913, §§ 9758, 9759. This was for uniformity that there should be substantially the same usury laws for state and national banks and private individuals as well. It was thus necessary to adopt substantially the Federal banking act as our usury statute, because, so far as the operation of national banks is concerned, "the definition of usury and the penalties affixed thereto must be determined by the national banking act, and not by the law of the state. *Farmers' & M. Nat. Bank v. Dearing*, 91 U. S. 29, 23 L. ed. 196. In that case it was held that a law of New York forfeiting the entire debt for usury was superseded by the national banking law, and that such law was only to be regarded in determining the penalty for usury." *Hazeltine v. Central Nat. Bank*, 183 U. S. 132, 133, 46 L. ed. 118, 119, 22 Sup. Ct. Rep. 50. And the same is true in equity suits in foreclosure. *Schuyler Nat. Bank v. Gadsden*, 191 U. S. 451, 48 L. ed. 258, 24 Sup. Ct. Rep. 129. The Federal national banking act imposing this penalty was enacted in 1864, repealing the former penalty imposed by congressional act in 1863 (12 Stat. at L. 665, chap. 58), providing for a forfeiture of the entire principal and interest, evidently in harmony with the then existing usury statutes of New York and some other states. The act of 1863 was a penalty, and the present statute, adopted a year later, was no less a penalty. 11 Enc. U. S. Sup. Ct. Rep. 852, and cases cited. And our statute likewise penalizes for the taking of usury, but, in entire harmony with the Federal act, the penalty applies only to the interest, and not to the principal evidenced by the note. "The penalties laid down by the statute, therefore, are the only ones that can be considered,

as the rule is that the terms of the statute govern as to that question." *Grove v. Great Northern Loan Co.* 17 N. D. 352-359, 138 Am. St. Rep. 707, 116 N. W. 345. But in applying the usury statute it must not be overlooked that it contemplates penalizing by a declared "forfeiture of the entire interest which the note . . . carries with it or which has been agreed to be paid thereon." The penalty is imposed in explicit terms as a forfeiture of the entire interest agreed to be paid or carried by the note. With this as the penalty for the taking of usury, the only inquiry left open is whether the note is usurious. *Brown v. Marion Nat. Bank*, 169 U. S. 416, 42 L. ed. 801, 18 Sup. Ct. Rep. 390. "The forfeiture declared by the statute is not waived or avoided by giving a separate note for the interest or by giving a renewal note in which is included the usurious interest. No matter how many renewals may have been made, if the bank has charged a greater rate of interest than the law allows, it must, if the forfeiture clause of the statute be relied on and the matter is thus brought to the attention of the court, lose the *entire* interest which the note carried or *which has been agreed to be paid*. By no other construction of the statute can effect be given to the clause forfeiting the entire interest which the note, bill, or other evidence of debt carries or which was agreed to be paid, but which has not been actually paid." Consult *Fowler v. Equitable Trust Co.* 141 U. S. 384, 35 L. ed. 786, 12 Sup. Ct. Rep. 1. Also *Farmers' & M. Bank v. Hoagland*, 7 Fed. 159, and *Danforth v. National State Bank*, 17 L.R.A. 622, 1 C. C. A. 62, 3 U. S. App. 7, 48 Fed. 271-276, declaring that "the statutory forfeiture is not a part of the interest, but all of it. 'The entire interest which the note, bill, or other evidence of debt carries with it or which has been agreed to be paid thereon' is comprehensive language. It would be difficult to employ broader terms. The legislative intent, we think, was utterly *to destroy the interest-bearing capacity of the instrument*. The interdiction of a recovery of interest by the transgressing bank is salutary, and full effect should be given to it. These views have prevailed in the courts." Citing *First Nat. Bank v. Stauffer*, 1 Fed. 187; *First Nat. Bank v. Childs*, 133 Mass. 248, 43 Am. Rep. 509; *Alves v. Henderson Nat. Bank*, 89 Ky. 126, 9 S. W. 504, 3 Browne Nat. Bank Cas. 452. This language adopted by the Federal courts in passing upon this question was evidently adopted from a construction of the Federal banking act in *Schutt*

v. Evans, 109 Pa. 625-628, 1 Atl. 76, where the following is found: "It will be noticed that the act of Congress strikes down the usurious contract to the extent of the interest. It strikes at interest as interest. If more than the lawful interest has been charged or reserved, the *interest-bearing power* of the note or other obligation is destroyed. The whole stipulated interest is forfeited." This basic reasoning is the settled construction of the Federal statute and similar state ones on usury. "If a national bank discount a note at a usurious rate of interest, paying the borrower the proceeds, less the interest, and suit be brought to recover the loan, and the borrower pleaded the usury, the bank will recover the face of the note, *less the entire interest* taken out, received, or reserved, *and no more*. It will thus collect the sum of money it actually paid out, being punished for receiving interest in excess of the legal rate by forfeiting *all* interest. . . . Usury forfeited the entire loan or debt under the banking act of February 25, 1863 [12 Stat. at L. 665, chap 58]. This Congress thought was too severe, and the Act of 1864, with the exception already noticed, limits the forfeiture to the interest only." The exception referred to concerns the inability to recover usurious interest paid after a lapse of two years from payment. *National Bank v. Davis* (C. C. Ind.) 8 Biss. 100, Fed. Cas. No. 10,038. But *Citizens' Nat. Bank v. Donnell*, 172 Mo. 384, 72 S. W. 925, appealed and affirmed in 195 U. S. 369, 49 L. ed. 238, 25 Sup. Ct. Rep. 49, is exactly parallel and decisive on all points involved. Quoting from the syllabus of the state report: "Where a renewal note included the principal of a former note, with usurious interest thereon, and also unlawful interest charges on certain overdrafts and the long account between the parties was one continuous transaction, the entire transaction was affected with usury from the time that any item thereof became tainted, and subjected the payee to a forfeiture of the entire interest on the former note and on the overdrafts under the section of the national banking act . . . providing that the charging of such excessive interest shall be deemed a forfeiture of the entire interest which the note carries with it." This involved many separate usurious and nonusurious transactions extending over several years, evidenced by many notes taken and cash advances made, with part of the transactions usurious and part nonusurious. The Federal Supreme Court says: "There is no doubt, of course, that the court could go behind

the face of the present note (for \$20,000) and analyze the sum which it represents into its original elements." And this analysis it made as follows, quoting: "The supreme court of Missouri held that the plaintiff must forfeit all interest from the beginning of the above transactions and could recover only the original \$15,000 [nonusurious item evidenced by an earlier note], the actual overdraft on July 12, 1895, \$474.24 [upon which usurious interest had been computed and a usurious note had been taken previously for \$596.74], the bank credit of \$230, given the same day [cash advanced—nonusurious], the note of October 1, 1895 for \$2,500 [another nonusurious advancement in cash], the overdraft on April 25, 1896 of \$874.81 [nonusurious cash advanced], and the bank credit of \$2.42 [nonusurious]—in all, \$19,081.97, [for which the \$20,000 note bearing lawful interest had been taken] less \$5,500, collected on account since the action was begun." The state court was affirmed. The statements in brackets in the foregoing quotation are inserted, but will be found to be true to fact by reference to the opinion by the state court in 72 S. W. 925. It will be noticed that the items, the same as in the case at bar, consist of both usurious and nonusurious loans, all finally carried into one note, but without the purging of any of the previous usurious transactions. And the nonusurious portions bore about the same ratio to the usurious portion of the consideration for the note in suit as those in the case at bar. The \$20,000 note was a mixture of usurious and nonusurious items, with the nonusurious debt ten times the amount of the tainted items. The bank sought to have done exactly what was done in the judgment appealed from in the case at bar, but the state supreme court denied all interest, allowing a recovery of only the total of advancements and cash paid and was affirmed in the Federal Supreme Court. The Federal Court syllabus reads: "A national bank whose action on a promissory note is met by the plea of usury may not avoid the forfeiture of the entire interest, imposed by U. S. Rev. Stat. § 5198, Comp. Stat. 1913, § 9759, *in absolute terms*, by then declaring an election to remit the excessive interest." The case is parallel in facts with ours, and its interpretation and application of the identical statute from which ours was taken should be conclusive. No interest whatever can be recovered on the notes in suit in the face of defendant's plea and proof of usury. *First Nat. Bank v. Watt*, 184 U. S. 151, 46 L. ed. 475, 22 Sup. Ct. Rep.

457. The debt evidenced by these notes was but \$3,955 at the most, less unpurged interest on the \$330 and \$356 note, for which as one transaction notes aggregating \$4,000 bearing 12 per cent interest were taken. Had it been a loan of \$3,955 or less for which these two notes were taken as but one transaction, no question could arise but what these notes would be usurious. Again, had the bank discounted plaintiff's \$356 note \$45, and loaned him the amount paid him and taken these notes for \$4,000, they would have been likewise usurious under all authority, as excessive interest cannot be taken by way of discount. *National Bank v. Johnson*, 104 U. S. 271-276, 26 L. ed. 742-745. No distinction can be made in principle between such transactions and those in suit. "In so far, then, as the notes in suit embrace the forfeited interest, they are without consideration. Moreover, it is an established principle that if there be usury in the original transaction, it affects all consecutive securities, however remote, growing out of it. *Walker v. Bank of Washington*, 3 How. 62, 11 L. ed. 494; *Campbell v. Sloan*, 62 Pa. 481. And neither the renewal of an old nor the substitution of a new security between the same parties can efface the usury." *Farmers' & M. Bank v. Hoagland*, 7 Fed. 159-161, approved in *Brown v. Marion Nat. Bank*, 169 U. S. 416, 42 L. ed. 801, 18 Sup. Ct. Rep. 390. The entire principal, \$4,000, is tainted with usury, for which the penalty in law and equity under the plain mandate of the statute is the forfeiture of all interest "which has been agreed to be paid thereon."

The decision would be the same, however, if the source of our statute was ignored and the Federal holding disregarded if precedent be followed. In scanning decisions, however, reference should be had and kept in mind as to whether the statute under which the decision is given declares, as does ours, a penalty or merely a remission of the usurious over the legal interest, of which New Jersey under its early statutes was an example. See the construction thereof in *Bedle v. Wardell*, 25 N. J. Eq. 349, and *Mahn v. Hussey*, 28 N. J. Eq. 546. But for this radical difference in statutes, *Mahn v. Hussey*, identical on facts, would be authority contrary to our holding. And the early statutes of Ohio were like New Jersey. *Baggs v. Loudonback*, 12 Ohio, 153, in the opinion of which it is said: "In most countries it [usury] works a forfeiture of the whole debt tainted with usury. In our state

the law is more mild,—not affecting the debt, but simply forbidding a recovery of the *illegal* interest.” For decisions supporting our holding on identical or closely analogous facts, see: *McGuire v. Campbell*, 58 Ill. App. 188; *Fulton Bank v. Benedict*, 1 Hall, 529, at 602–610; *Jackson ex dem. Skinner v. Packard*, 6 Wend. 415; *Rice v. Welling*, 5 Wend. 595; *Williams v. Fitzhugh*, 44 Barb. 321, same case decided on appeal in 37 N. Y. 444; *Farmers’ & M. Bank v. Joslyn*, 37 N. Y. 353; *Hammond v. Hopping*, 13 Wend. 505; *McCraney v. Alden*, 46 Barb. 272.

In *McGuire v. Campbell*, quoting from the opinion, a loan was made of “\$1,000, and \$500 of this amount was paid the next day, and the contract was verbally made to pay 12 per cent interest on the loan, and the same usurious contract existed during all the time up to and at the time the judgment was confessed. Between the time of the payment of said \$500 and March 1, 1879, the usurious interest amounted to \$185, of which sum \$105 was paid, and on March 5, 1879, the borrowers gave a renewal note of \$580, which included the balance of the usurious interest unpaid. The loan was continued without other renewal by note until the note sued on was executed and that note was made up of the note for \$580 and usurious interest thereon at 12 per cent, and another debt of \$105. On March 1, 1879, deducting \$500 principal and \$105 usurious interest paid from the \$1,000 loan, which under the law were proper deductions, \$395 was the amount then due, and adding to it the principal of \$105 debt included in the sum of the note sued on, and deducting all the usurious interest, there would remain due plaintiff \$500, as found by the court. . . . The effect of contracting for or reserving usurious interest, whether by verbal or written contract, is the forfeiture of all interest. This statutory provision applies in this case.”

It is contended that the note is tainted only to the extent of the usurious indebtedness incorporated in it. Reference is made to 29 Am. & Eng. Enc. Law, 518, where, in a general discussion of usury, it is stated: “If a new obligation is given in which are incorporated the original usurious indebtedness and also a valid nonusurious indebtedness, the new obligation is not tainted with the original usury so far as the nonusurious indebtedness is concerned, but it is usurious to the extent of the original usury carried into it,”—citing *Porter v. Jefferies*,

40 S. C. 92, 18 S. E. 229; German Ins. Bank v. Fabel, 24 Ky. L. Rep. 1721, 72 S. W. 329; McCraney v. Alden, 46 Barb. 272. Porter v. Jefferies sustains the text, but without discussion or citation of authority, and what was said was but *obiter*, as the court concludes that "the instruction complained of, even if erroneous, could not possibly have affected the result." The instruction in question was that the new loan, taken under circumstances parallel with those in this case, was not tainted with usury. The other two cases cited do not sustain the text. On the contrary, McCraney v. Alden, 46 Barb. 272, merely followed the doctrine that, where a usurious note is made up in part of a renewal of a valid pre-existing debt secured, while the renewal note is void, yet a recovery will be permitted upon the pre-existing original nonusurious debt. That is not the question here involved. It is conceded that the debt itself, the money loaned, can be recovered. The question instead is one of forfeiture of interest. And the same is true of the text in 39 Cyc. at pp. 990 and 996, concerning severable contracts under usury and part of the debt secured free from usury. What is said by the text-writers is evidently with reference to the subject generally. This opinion is written after a thorough and exhaustive research has demonstrated that any further discussion of the numerous authorities must be useless. Suffice it to say that no purging of usury is involved nor can be, as under this statute only the parties to the usurious transaction can purge it of usurious taint after action brought on the note, a court cannot, under Citizens' Nat. Bank v. Donnell, 195 U. S. 369, 49 L. ed. 238, 25 Sup. Ct. Rep. 49. Usury can only be purged by contract.

The only division of authorities seems to be upon the question of whether the legal rate—7 per cent in the absence of contract—should be allowed plaintiff upon the amount of money actually loaned by him to defendant in all the transactions culminating in the notes in suit; or whether, on the contrary, he should be held to forfeit the entire interest thereon. See the main and dissenting opinions in Owens v. Wright, 161 N. C. 127, 76 S. E. 735, Ann. Cas. 1914D, 1021, and note at 1028. The allowance of any interest seems to be a disregard of the usury statute requiring a forfeiture of all interest. Holdings as to what is equitable turn largely upon whether the usury statute declares a forfeiture of all interest where usury is present, or whether the

"statute prescribes a rate of interest, and simply forbids the taking of more, and, if more is contracted for, the contract is good for what might be lawfully taken." *McBroom v. Scottish Mortg. & Land Invest. Co.* 153 U. S. 318, 38 L. ed. 729, 14 Sup. Ct. Rep. 852. While under ordinary circumstances, it is but equitable to require as a condition to the granting of equitable relief the payment of legal interest, to do so in usury cases is nothing short of either refusal to apply the statute or an evasion of it in part. Equity cannot shut its eyes to the declaration of the statute that he who takes usury shall be penalized by the forfeiture of not a part but of *all* interest; and as it is impossible to penalize and yet allow interest as upon a contract for money had and received, equity should follow the law rather than supersede it. Besides, it is a pure fiction to say that interest should be allowed as for money had and received as in the absence of any agreement for interest, because an interest rate had been stipulated in violation of both civil and penal statutes, and the fiction is therefore contrary to the fact.

The trial court, however, did not allow interest upon the basis of 7 per cent, but upon 12 per cent. Little support can be found in the authorities for that basis.

The notes in suit are usurious. Plaintiff will recover the amount he has advanced in cash in all of the transactions, but without any interest thereon whatever, except that he should be allowed interest upon the \$966 note at 12 per cent from its date, April 1, 1910, to September 28, 1910, the date of the taking of the two \$2,000 notes; that no other interest should be allowed to plaintiff; and that upon said indebtedness there should be credited the payments made, aggregating \$2,435.97, leaving approximately \$1,500 still due plaintiff from defendant, and for which judgment of foreclosure should be entered, less appellant's costs on this appeal. The judgment appealed from is directed to be modified accordingly.

FISK, Ch. J. I am unable to concur in the majority opinion and with due deference to the views as there expressed, I think my associates have failed to discriminate in reading the authorities.

In brief the facts are as follows: In April, 1910, defendant executed and delivered to plaintiff two promissory notes, one for \$330 in which there was included a bonus of \$30, and the other for \$966.43 containing

no bonus. In July following he executed and delivered to plaintiff a note for \$356, being a renewal of the first-mentioned note and containing an additional bonus of \$15. On September 28th of that year he executed and delivered to plaintiff the two notes in suit of \$2,000 each. All of such notes bore interest at 12 per cent per annum. The two last-mentioned notes were given as renewals of the prior notes and for other consideration. Aside from the sum of \$45 embraced in the two small notes, there was no bonus or usury in the notes in suit.

The sole question, therefore, is whether the latter notes are so tainted with the usury aforesaid as to justify and require a court of equity to enforce a forfeiture of the entire interest accrued thereon. The learned trial court thought not, and he merely deducted from such notes the total bonus, aggregating \$45, together with a sum equal to all interest on the two small notes from their dates to the date of entry of judgment, amounting in all to \$218.35. In so doing, I am satisfied that such court very properly and correctly meted out exact justice to the defendant. His decision is not only sound on principle, but it is supported by all the authorities which are in any way in point in so far as I am able to discover. See: 29 Am. & Eng. Enc. Law, 2d ed. 518; 39 Cyc. 990, 996; *Mahn v. Hussey*, 28 N. J. Eq. 546; *Ammondson v. Ryan*, 111 Ill. 506; *Porter v. Jefferies*, 40 S. C. 92, 18 S. E. 229; *McCraney v. Alden*, 46 Barb. 272; *Bank of Russellville v. Coke*, 20 Ky. L. Rep. 291, 45 S. W. 867; *Hinkson v. Wigglesworth*, 20 Ky. L. Rep. 1161, 48 S. W. 1079; *German Ins. Bank v. Fabel*, 24 Ky. L. Rep. 1721, 72 S. W. 329; *Farmers' & M. Bank v. Hoagland*, 7 Fed. 159; *Wilson v. Fleming*, 23 Ind. 119; *Smith v. Heath*, 4 Daly, 123; *Farmers' & M. Bank v. Joslyn*, 37 N. Y. 353; *Burnhisel v. Firman*, 22 Wall. 170, 22 L. ed. 766; *Graves v. Safford*, 41 Ill. App. 659; *Parish v. Stone*, 14 Pick. 198, see pages 208, 209 and 211, 25 Am. Dec. 378; *Guild v. Belcher*, 119 Mass. 257; *Langdon v. Gray*, 52 How. Pr. 387; *McFerrin v. White*, 6 Coldw. 499.

The text in 29 Am. & Eng. Enc. Law, 2d ed. 518, is as follows: "If a new obligation is given in which are incorporated the original usurious indebtedness, and also a valid nonusurious indebtedness, the new obligation is not tainted with the original usury so far as the nonusurious indebtedness is concerned."

The author of the article on usury in 39 Cyc. at page 990 states: "But when the obligation is severable, and a part thereof can be as-

signed to the usurious consideration, and a part to a consideration that is legal, the courts will enforce such part of the obligation as rests upon the valid consideration, visiting the penalties of usury only upon that part which is supported by the illegal consideration. Where one of two separate and independent loans is usurious, the taint does not adhere to the other, although both were between the same parties, closed at the same time, and secured by the same mortgage." At page 996 he further states: "When a mortgage or other obligation is given to secure a debt partly usurious and partly free from usury, its validity depends upon the same considerations as the validity of the debt secured. If the part of the debt which is free from usury may be separated from the other as having an independent existence, the mortgage may be enforced to the extent of such part of the whole amount secured. But, if the debt is inseparable because the usurious consideration extends to the whole amount, the mortgage falls under the penalty imposed by the statute as completely as the debt itself."

Mahn v. Hussey, 28 N. J. Eq. 546, is on all fours with the case at bar. I quote from the opinion of the New Jersey court as follows: "The pleadings disclose the following state of facts: The complainant, on the 2d of March, 1868, lent to the defendant Hussey \$4,500, taking his bond and mortgage executed by him and his wife for \$5,000, with interest. On the 29th of December, 1868, the complainant lent to Hussey \$1,000 more, on like bond and mortgage; and in March, 1873, he lent to him \$1,500, the payment of which, with the amount of the former loans, was secured by a bond and mortgage for \$7,500 and interest, on the premises described in the former mortgages, which were then canceled. The principal on this last mortgage, which is the mortgage in suit, was made payable on the 1st of July, 1878, and the interest semiannually, with provision that if default should be made in the payment of the interest for thirty days, the principal should, at the option of the mortgagee, immediately become due. On the first loan of \$4,500, it was agreed that the complainant should receive a premium of \$500, which was included in that mortgage. The answering defendants, by their answer, set up the defense of usury, and they insist that the mortgage in suit is so affected thereby that not only is the whole of the interest forfeited, but the bill must be dismissed, because no interest has even been recoverable on the mortgage, in con-

sequence of the usury, and therefore there has been no default; and, if no default, the principal is not due, and will not be due until the 1st of July, 1878. The mortgage in suit was given to secure the payment of three several and distinct loans by the mortgagee to the mortgagor, Hussey. On the first of these a premium was taken, but none on either of the others. The second and third loans were neither of them usurious. The first was. To that the forfeiture should be confined. *Crippen v. Heermance*, 9 Paige, 211. No interest is recoverable in respect to the amount of that mortgage, and the interest received by the mortgagee on the \$500 premium must, with the premium, be deducted. *Bedle v. Wardell*, 25 N. J. Eq. 349. Interest is recoverable on the rest of the amount of the principal, that is, on \$2,500."

Ammondson v. Ryan, 111 Ill. 506, is also squarely in point. In that case there was an original loan of \$2,000 in which there was a bonus of \$50. To this latter an additional loan was made of \$700, containing no usury, and these two loans with unpaid interest on the first amounted to a total indebtedness of \$3,000 for which a new note secured by a trust deed was given. It was held by the supreme court of Illinois that *in so far* as the original \$2,000 note entered into the \$3,000 note and deed of trust, the latter could be enforced for only \$1,950, but as to the \$700 portion of the consideration the new note could be enforced with the stipulated rate of interest.

Porter v. Jefferies, 40 S. C. 92, 18 S. E. 229, is also directly in point, as well as many of the other cases above cited, but some of which I do not claim to be in point except on principle.

The numerous authorities cited in the majority opinion were no doubt correctly decided under the facts involved, but as I read them they are each readily distinguishable from the case at bar. Much reliance is placed upon the case of *Citizens' Nat. Bank v. Donnell*, 172 Mo. 384, 72 S. W. 925 (affirmed in 195 U. S. 369, 49 L. ed. 238, 25 Sup. Ct. Rep. 49), it being stated that such case is "*exactly parallel and decisive on all points involved.*" I am unable to thus construe the opinion in that case. Contrary to the facts in the case at bar, the renewal note in that case did not cover two or more divisible obligations or indebtednesses, some of which were not tainted with usury, but the language of the opinion shows that the consideration of the renewal note embraced nothing but usurious transactions. The language is very significant. It is

as follows: "Where a renewal note included the principal of a former note, *with usurious interest thereon*, and also *unlawful interest charges* on certain overdrafts, and the long account between the parties was *one continuous transaction*, the entire transaction was affected with usury," etc. It is entirely clear from the above that there was no portion of the consideration of the renewal note which was not tainted with usury, and this differentiates that case from the case at bar. I think the other cases cited in the majority opinion may all be differentiated from the case at bar in like manner.

It is, of course, a well-settled general rule that a note given in renewal only of a usurious note is usurious; but as I understand such rule, it is not broad enough to uphold appellant's contention under the facts in the case at bar. Here the usurious part of the indebtedness is very small and easily separable from the nonusurious portion, and as a consequence the two large notes cannot be properly said to be tainted except to the extent of the usurious part of the indebtedness.

Most, if not all, of the authorities cited by appellant's counsel, as well as in the majority opinion, are cases involving renewal notes covering only indebtedness which was previously tainted with usury, and, of course, are not in point. I think the judgment should be affirmed.

CITY OF FARGO, a Municipal Corporation, v. HAMILTON W. GEAREY, John P. Hardy, Wm. P. Porterfield, J. Frank Treat, Clare B. Waldron, Constituting the Park Commissioners for the Park District of the City of Fargo, a Corporation.

(156 N. W. 552.)

Special assessments were levied by the city, acting by its council, against

Note.—The liability to local assessments for benefits of property exempt from general taxation is the subject of notes in 35 L.R.A. 33; 18 L.R.A.(N.S.) 451; 32 L.R.A.(N.S.) 303; and 44 L.R.A.(N.S.) 57, and the cases setting forth the rule as to public property are in accord with FARGO v. GEAREY, that such public property is not, in the absence of statute, assessable for such improvements.

See also on whether public property is subject to assessment for local improvements note in 33 Am. St. Rep. 400.

Island Park, in Fargo, to reimburse for paving a street bordering upon said park. The city park commissioners refused to levy a tax to meet instalments of such special assessment falling due. From a judgment in mandamus directing such a tax levy the park commissioners appeal.

Held:—

City Council — jurisdiction — special assessments — paving — benefits — city park commissioners.

1. The city council had no authority or jurisdiction to levy the special assessment or authorize the paving of the street bordering upon and adjacent to the city park.

Statutes — construction — authority — park commissioners — special assessments — benefits.

2. The statutes grant sole and exclusive authority to the park commission to pave such streets and levy special assessments for resultant benefits.

City — street improvements — city parks — control — legislature — delegation of power.

3. Such an improvement to streets adjacent to city parks is one within the declared purposes for furtherance of which exclusive control has been delegated by the legislature to the park commission.

Park commission — acts of city council — void — to adopt and validate — paving — special assessments.

4. Power of the park commission to levy a special assessment against park property is not involved, and is not determined.

Mandamus — proceedings — costs.

5. The park commissioners are directed to adopt and validate as far as possible the void acts of the city council in the authorization of the paving and especially assessing therefor that property so benefited may not escape assessment for such benefits; and the future procedure is suggested.

6. Mandamus refused and the proceedings dismissed, no costs to be taxed.

Opinion filed February 4, 1916.

Appeal from the District of Cass county *Pollock, J.*

Reversed.

This case was taken for investigation and study in the practice court of the Law Department of our State University, and very creditable briefs were filed herein by consent of counsel by the following members of the Law Department, *viz.:* P. R. Bangs, J. Carl Loudon, C. F. Kelsch, Earl McFadden, and Franklin Page for plaintiff; and J. J.

33 N. D.—5.

Mulready, C. F. Peterson, B. O. Angell, Walter Schlosser, P. M. Paulson, and E. A. Sweggum for the Park Commission.

W. J. Clapp, for appellants.

Public property, used for public purposes, is not subject to special assessments. Because the property here involved belongs to a municipal corporation and is only held for public use, it is not subject to this attempted special assessment. 4 Dill. Mun. Corp. 5th ed. § 1446; *Pittsburg v. Sterrett Subdist. School*, 204 Pa. 635, 61 L.R.A. 183, 54 Atl. 463; *La Grange v. Troup County*, 132 Ga. 384, 64 S. E. 267, 16 Ann. Cas. 885; *Board of Improvement v. School Dist.* 56 Ark. 354, 16 L.R.A. 418, 35 Am. St. Rep. 108, 19 S. W. 969; *Worcester County v. Worcester*, 116 Mass. 193, 17 Am. Rep. 159; *Big Rapids v. Mecosta County*, 99 Mich. 351, 58 N. W. 358; *San Diego v. Linda Vista Irrig. Dist.* 35 L.R.A. 40, conclusion of note; *Clinton v. Henry County*, 115 Mo. 557, 37 Am. St. Rep. 415, 22 S. W. 494; *Louisville v. Leatherman*, 99 Ky. 213, 35 S. W. 625; *Mt. Sterling v. Montgomery County*, 152 Ky. 637, 44 L.R.A.(N.S.) 57, 153 S. W. 952; *Edwards v. Ocala*, 58 Fla. 217, 50 So. 421; 1 Bl. Com. 262; *Endlich*, Interpretation of Statutes, §§ 161, 163; 1 Kent, Com. 13th ed. 460; *Boston Seaman's Friend Soc. v. Boston*, 116 Mass. 189, 17 Am. Rep. 153.

The park district of the city of Fargo, being a municipal corporation, has exclusive jurisdiction over its parks, there cannot be at the same time, within the same territory, two distinct municipal corporations exercising the same powers, jurisdiction, and privileges. Laws of 1907, chap. 179; Pol. Code, art. 24; Comp. Laws 1913, §§ 4055, 4063; *West Chicago Park Comrs. v. Chicago*, 152 Ill. 392, 38 N. E. 697; *Willcock, Mun. Corp.* 27; 1 Dill. Mun. Corp. 4th ed. § 184; *Grant, Corp.* 18; *Taylor v. Ft. Wayne*, 47 Ind. 274; *Strosser v. Ft. Wayne*, 100 Ind. 443; *State v. Winter Park*, 25 Fla. 371, 5 So. 818; *Paterson v. Society for Establishing Useful Mfrs.* 24 N. J. L. 385; *Rex v. Pasmore*, 3 T. R. 199, 1 Revised Rep. 688; 15 Am. & Eng. Enc. Law, 1007.

Park boards have no authority to levy taxes or otherwise provide for street improvements done by the city. Comp. Laws 1913, § 4059.

Park commissioners cannot be compelled to perform an illegal act, and are not estopped from making objections to the levy at this time.

United States v. County Ct. 99 U. S. 582, 25 L. ed. 331; Robertson Lumber Co. v. Grand Forks, 27 N. D. 556, 147 N. W. 249.

A municipal corporation cannot be held to have waived a jurisdictional defense. 3 Dill. Mun. Corp. 5th ed. § 1194.

The city, and not the park district, can and must pay or provide for the assessments. Comp. Laws 1913, § 3723; Louisville v. Leatherman, 99 Ky. 213, 35 S. W. 625; West Chicago Park Comrs. v. Chicago, 152 Ill. 392, 38 N. E. 697.

Emerson H. Smith, for respondent.

The law contemplates that all benefited property located within the assessment district shall be assessed, without expressly excepting any property, either public or private, save that of the United States. Rev. Codes 1905, § 2796; Comp. Laws 1913, § 3721; Re Howard Ave. North, 44 Wash. 62, 120 Am. St. Rep. 973, 86 Pac. 1117, 12 Ann. Cas. 417; Edwards & W. Constr. Co. v. Jasper County, 117 Iowa, 365, 94 Am. St. Rep. 301, 90 N. W. 1011; Scammon v. Chicago, 42 Ill. 192; Newberry v. Detroit, 164 Mich. 413, 32 L.R.A.(N.S.) 303, 129 N. W. 699; Whittaker v. Deadwood, 23 S. D. 543, 122 N. W. 590; New Orleans v. Warner, 175 U. S. 138, 44 L. ed. 106, 20 Sup. Ct. Rep. 44; Roosevelt Hospital v. New York, 84 N. Y. 112; Franklin County v. Ottawa, 49 Kan. 747, 33 Am. St. Rep. 396, 31 Pac. 788; Higgins v. Chicago, 18 Ill. 276; McLean County v. Bloomington, 106 Ill. 209; Adams County v. Quincy, 130 Ill. 566, 6 L.R.A. 155, 22 N. E. 624; Sioux City v. Independent School Dist. 55 Iowa, 150, 7 N. W. 488; Hassan v. Rochester, 67 N. Y. 528.

Section 176, state Constitution, does not relate to local assessments, but only to general taxation. Webster v. Fargo, 181 U. S. 394, 45 L. ed. 912, 21 Sup. Ct. Rep. 623.

A "way" technically speaking, is the passage over the lands of another. Postal Telegr. Cable Co. v. Southern R. Co. 90 Fed. 32; Dennis v. Wilson, 107 Mass. 593; Chollar-Potosi Min. Co. v. Kennedy, 3 Nev. 372, 93 Am. Dec. 409.

The statutes give to the city much greater powers than to the park board; these officers do not perform the same duties; the park commissioners and the city council do not possess the same jurisdiction, nor are the functions of their offices the same. Sargent County v. Sweetman, 29 N. D. 256, 150 N. W. 876.

The city had the power and authority to assess the park district as an integral part of assessment, and its procedure was that authorized by law. *Comp. Laws 1913, § 3721; Edwards & W. Constr. Co. v. Jasper County, 117 Iowa, 365, 94 Am. St. Rep. 301, 90 N. W. 1006.*

The appellant should pay for the benefits received by it, the same as any other property owner. *Edwards & W. Constr. Co. v. Jasper County, 117 Iowa, 365, 94 Am. St. Rep. 301, 90 N. W. 1008; Scammon v. Chicago, 42 Ill. 192; McLean County v. Bloomington, 106 Ill. 209.*

The park district should bear its own burden, in proportion to its share in the benefits derived from the assessment. *Newberry v. Detroit, 164 Mich. 413, 32 L.R.A.(N.S.) 303, 129 N. W. 699.*

Goss, J. Fargo, acting by its city council, has levied special assessments aggregating \$8,099 against Island park within said city for paving of streets bordering upon Island park. Part of the cost of the paving has been thus assessed against private property owners and the balance against the city park. Fargo had adopted a park district system and with it a park commission. That commission and the individual members thereof, these defendants, have at all times refused to recognize the jurisdiction of the city or its council or special assessment commission acting under it, to levy or enforce these special assessments against Island park. Thereupon they were mandamusd to include instalments of special assessments due and falling due, and to thus make provision in 1914 for the payment of past, present, and future instalments of these special assessments against the park. Upon trial a peremptory writ was awarded directing them to levy a tax upon the park district for said purposes. The appeal is from the judgment thereon.

Logically, the first question presented is concerning the exercise of the power of special assessment so far as a decision thereon is necessary. Defendants challenge the jurisdiction of the city commission to act and claim the right themselves, and that under the principle that there cannot be at the same time within the same territory two distinct municipal corporations exercising the same powers, jurisdiction, and privileges over the same subject-matter, the city council was without jurisdiction to act, and was but invading the province of the park commission in so doing. A careful investigation of statutes and authority sustains their contention.

As the matter is primarily one of interpretation of statutes to arrive at where the power to levy these special assessments has been vested, it is well to consider the scope, purposes, express powers granted, and limitations reserved and implied, all concerning the exercise of such powers, and determining any apparent conflict of jurisdiction in the matter. The statutes, §§ 4055-4063, contemplate a radical change in the distribution of governmental authority. Certain powers are taken from the city council and vested in an elective park commission. The present statute providing for their election obviates the unconstitutionality of the 1905 act, as passed upon in *Vallely v. Park Comrs.* 16 N. D. 25, 15 L.R.A.(N.S.) 61, 111 N. W. 615, holding portions of the 1905 act, the initial legislation on the subject of park commissions, unconstitutional in that it authorized a local appointive instead of elective body, to levy taxes for local improvements. The present act is comprehensive, and designed as complete legislation on that subject. It was intended that those cities adopting it should have a park commission with certain sole and exclusive powers incidental and necessary to the acquirement, maintenance, control, and improvement of city parks, boulevards and ways. Under it the park district by its commission exercises to the full the statutory powers granted and as corporate agents for the city. The park district is at least coextensive with the city limits. The legislature has endeavored to grant powers to the park commission beyond city limits. Sess. Laws 1915, chap. 71. Nowhere in the act can there be discerned any intent that any of its powers should be exercised under the supervision, control, or direction of any other body or agent of the city. It creates an exception to the general law governing cities, applicable to those cities only who adopt it. To that extent the general law governing cities must be taken as amended by its provisions as to those cities electing to proceed under it, as in the case at hand. It is the corporate agent for the administration of city parks, possessing all the powers expressly granted by statute and those necessarily implied from those granted. And what are those powers? Under § 4057 it is to "acquire . . . hold, own, possess, and maintain real and personal property in trust for the *purpose of* parks, boulevards, and ways and to exercise all the powers hereinafter designated or which may hereafter be conferred upon it" (the park district). These powers exercised by the park commission are specifically enumerated as "power

(1) To acquire . . . land . . . for parks, boulevards, and ways, and shall have sole and exclusive authority to maintain, govern, erect, and *improve* the same; (2) to lay out, open, grade, curb, pave, and otherwise improve any path, way, or street, in, through, or around said parks; . . . (4) to levy special assessments on all property specially benefited by the purchase, opening, establishment, and improvement of such parks, boulevards, and ways or streets or ways about the same." With these broad powers are also granted others, such as authority to pass ordinances regulative of said property; and power "to levy taxes upon all property within . . . [the park] district for the purpose of maintaining and improving said parks, boulevards, and ways; . . . to establish building lines for all property fronting on any park, boulevard, or way . . . and to control the subdivision and platting of property within 400 feet thereof; to borrow money in anticipation of taxes already levied; . . . to connect any park or parks owned or controlled by it with any other park or parks, and for that purpose to select and take charge of any connecting street or streets or parts thereof, and the said park commission *shall have sole and exclusive charge and control of such street or streets so taken for such purpose.*" [Comp. Laws 1913, § 4059] Powers not necessary to be enumerated are also granted. Section 4062, Comp. Laws 1913, of this comprehensive enactment, recognizing all the foregoing, provides: "In the issuing of bonds, warrants, certificates of indebtedness, and in levying any tax or special assessment, and in otherwise carrying out, enforcing, or making effective any of the powers herein granted, the park commissioners and their officers and the park district shall be governed by and follow the laws enacted for the government of cities." With this general *résumé* in mind of the statutory powers granted, it will be noted that this board have sole and exclusive authority to improve parks. That their authority is not limited to the area of the park itself, but extends over and includes all streets bounding parks; that it may also take charge of streets connecting any park with others, as to which "sole and exclusive charge and control" "for such purpose" is granted. If it be regarded as in the least indefinite as to whether sole and exclusive authority is granted it as to those matters enumerated in the second subdivision, *i. e.*, to "pave and otherwise improve . . . any street . . . around said parks," § 10 of the act granting it sole and exclu-

sive authority as to connecting streets is elucidating, as it would hardly be maintained that the authority of the commission would be limited as to streets immediately surrounding the park and yet be sole and exclusive as to connecting streets with other parks, perhaps miles away. Then again the commission has the power "to establish building lines for all property fronting on any park, boulevard, or way under the direction and control of such commission, and to control the subdivision and platting of property within 400 feet thereof." The manifest purpose of all this is plain. The intent was to grant the commission the power to supervise property immediately beyond and adjoining the park, inclusive of boundary streets, that such public property and also adjoining private property may be regulated to procure and require uniformity of building lines, parking, boulevarding, and pleasing symmetry of contour, all conducing to the beauty of the park and to the benefit of the public. Certainly the legislature did not intend to grant such power of regulation and control and yet leave within the jurisdiction of another authority, the city council or city governing body, concurrent authority to "lay out, open, grade, curb, and otherwise improve" streets around said parks. On the contrary the statute explicitly grants such power exclusively to the commission as an included power to "otherwise improve any . . . street around said parks." And in the first subdivision it is stated that said commission "shall have sole and exclusive authority to maintain, govern, erect, and improve the same" (the park and immediately adjacent property). So construed the statute is an harmonious whole. So construed there can be no conflict of authority between the governing body of the city and the powers of the park commission, the express and implied powers of the latter superseding and excluding the exercise by the city through its council of any powers expressly or impliedly granted the park commission as to the property held by the park district in trust for the city, together with the streets and property immediately surrounding and abutting it, so far as the matters mentioned in the statute and committed to the care of the park commission are concerned.

Referring now to the assessment for paving of the street alongside of this park. The power to do this paving is conferred in express terms upon the park commission, and by necessary inference the power of the city council to pave said street is thereby excluded and withdrawn.

By the 4th subdivision of § 4059, together with § 4062, full authority is granted the park commission, and the manner of its exercise prescribed, and it is authorized thus "to levy special assessments on all property specially benefited by the . . . improvement of . . . such boulevards and ways or streets or ways about the same." The park commission alone possessed the power to pave and to levy special assessments to pay therefor against the property benefited throughout the park district, *i. e.*, the city of Fargo. In the manner of its exercise "the park district shall be governed by and shall follow the laws enacted for the government of cities." Section 4062. In other words, the park district, by its park commission, shall levy any such assessment through the use and assistance of such city officers as the city council would employ to make a special assessment against property benefited. The park commission, therefore, would utilize the services of the city special assessment commission, the city auditor and surveyor, and any other officers ordinarily connected with such an assessment. The park commission would sit in confirmation of the report of the special assessment commission, hear all appeals from that commission's report to it that would otherwise be taken to the city council, confirm and levy any special assessment made for this improvement, and take any other steps necessary and usual and generally performed by the city council in ordinary special assessments. The power to levy special assessments being with the Park Commission, it is within their power to spread the entire amount to be repaid by special assessments upon private property, instead of levying the same or any portion of the same against park property. Without passing upon the power of the commission to levy an assessment upon this park property, it may be said that there is nothing in the statutes requiring it under these circumstances. Instead, from the fact that such park district is coextensive with the limits of the city, and that property at some distance from the park may be specially benefited by its being beautified through the paving of the streets adjoining the park and because of its increased accessibility to the park, such outlying property may be specially assessed upon such benefits, and the proportionate cost of the improvement here sought to be assessed against the park may be equitably distributed by special assessment over a considerable extent of surrounding private property, if not throughout all the city, and there may be accomplished by special assessment

that which the city is seeking to do indirectly through the agency of direct taxation by the park commission. The park belongs to the city, is for the benefit of the whole city, and to the proportionate extent that it specially benefits any or all the property owners within the city their property may be specially assessed. It is, therefore, unnecessary to pass upon whether this park property may or may not be specially assessed for benefits. It will be assumed that as the board of park commissioners have refused to levy a tax to defray any part of the assessment attempted to be levied against the park, that it would not levy a special assessment against it. Granting that the commission has the power to specially assess the park, it rests in its discretion as to whether it will so exercise it, it having the exclusive power to levy.

Statutes closely similar to ours upon the subject of parks and park commissions do not seem to be plentiful. Illinois, New York, Michigan, Ohio, and probably other states have such. Doubtless our statute is patterned after those of Illinois, that state having most comprehensive legislation on the subject and being most closely analogous to ours. Before the adoption of the first legislation by this state creating a park commission, Chicago had been governed for years in such respects by a commission the powers of which had been defined as exclusive as against the general governing body of the city. *West Chicago Park Comrs. v. Chicago*, 152 Ill. 392, 38 N. E. 697. These statutes had been passed upon in different phases in *Chicago v. Carpenter*, 201 Ill. 402, 66 N. E. 362; *Cicero Lumber Co. v. Cicero*, 176 Ill. 9, 42 L.R.A. 696, 68 Am. St. Rep. 155, 51 N. E. 758; *Aldis v. South Park Comrs.* 171 Ill. 424, 49 N. E. 565; *West Chicago Park Comrs. v. Sweet*, 167 Ill. 326, 47 N. E. 728; *West Chicago Park Comrs. v. McMullen*, 134 Ill. 170, 10 L.R.A. 215, 25 N. E. 676; *Chicago & N. W. R. Co. v. West Chicago Park Comrs.* 151 Ill. 204, 25 L.R.A. 300, 37 N. E. 1079; *McCormick v. South Park Comrs.* 150 Ill. 516, 37 N. E. 1075; *Thorn v. West Chicago Park Comrs.* 130 Ill. 595, 22 N. E. 520; *People ex rel. Bransome v. Walsh*, 96 Ill. 232, 36 Am. Rep. 135; *West Chicago Park Comrs. v. Farber*, 171 Ill. 146, 49 N. E. 427. For the most recent cases see *Chicago City R. Co. v. South Park Comrs.* 257 Ill. 602, 101 N. E. 201, and *Van Nada v. Goedde*, 263 Ill. 105, 104 N. E. 1072. These authorities sustain this opinion.

That this decision may not be misleading it should be observed that

there is an implied limitation upon the exclusive jurisdiction and authority of the park commission over streets bordering parks or adjacent thereto. This limitation is found within the statute authorizing their jurisdiction for park, boulevard, and way purposes. In furtherance of such purposes the legislature has delegated to this board certain exclusive control as may be necessary to do the acts enumerated by the statute and those necessarily implied therefrom in carrying out the purpose. But there is reserved to the city over such property such rights as are necessarily incidental to its rights to grant franchises to use such streets, boulevards, and ways, such as the authorizing of street car lines, installing of sewer and water mains as part of the sewer and water systems for the city, and other reserved powers. *Chicago City R. Co. v. South Park Comrs.* 257 Ill. 602, 101 N. E. 201-205. And, on the other hand, what has been said as to the power of the park commission over city parks applies equally to city boulevards.

Respondent has cited § 3702, Comp. Laws 1913 (§ 2776, Rev. Codes 1905), granting cities general power, among others, to grade and pave streets, and contends that since said power has not been limited, although the various acts creating the park board have subsequently been enacted, that it should be held as controlling and granting the right to the city council in all cases to pave and pay therefor by special assessments. Instead, this power granted the city applies as to all cities not adopting park district control. It is a general statute. Those cities having park districts constitute exceptions thereto. To them the general statute has no application further than a general grant of power to the city, while the power itself is exercised by the park commission, instead of through channels that would carry it into effect in cities not having a park district system. And as to the term "way" respondent urges that exercise of sole and exclusive power having been authorized by the park commission over ways without special mention of streets in the first subdivision of § 4059, that by a necessary inference such authority over streets has been reserved to the governing body of the city. For reasons heretofore stated the statute will not bear that narrow interpretation. Besides, respondent overlooks the fact that "boulevards and ways" are used together, and a street may be either and either or both may be streets, according as the context requires interpretation. *Chicago City R. Co. v. South Park Comrs. supra.*

All questions raised necessary to a decision are passed upon by what has already been indicated as the law. But inasmuch as it is the duty of a court of equity upon invalidating an assessment to declare the status of proceedings, instead of leaving the authorities in the dark as to how to proceed (*Edwards v. Cass County*, 23 N. D. 555, 137 N. W. 580; *Comp. Laws* 1913, § 3715), the further course of proceedings that may be necessary will be indicated.

The paving should have been authorized by and constructed under the jurisdiction of the park commission, the power to levy the assessment therefor. However, acting under a misapprehension of law, the city council have attempted to authorize the paving, and the same has been put in and undoubtedly constitutes in fact an improvement, and one that would have been within the power of the park commission to have authorized and constructed. Apparently private property owners have acquiesced in what has been done, and like the city have secured benefits. The park commission possess only a public interest in the matter. They act only on behalf of the city and as its agent. As the park will not necessarily be assessed, the park commission has no such pecuniary interest as would give it standing to oppose, on behalf of the public, the improvement to the city if it is such in fact. In equity no sound reason exists why the park commission should not adopt the benefits, and validate as far as possible the irregular, and perhaps void, acts of the city council. The park commission may therefore proceed with their duty in the premises. It may declare the necessity for the improvement to have existed, ascertain the cost thereof and the benefits therefrom, and, using the proper agencies and officials, proceed to specially assess the property specially benefited within its park district the same as though it had originally authorized the work. Of course it will afford opportunity to all aggrieved property owners to be heard before confirming any assessment it may levy. Sections 3711-3714, *Comp. Laws* 1913, authorize the procedure indicated to the end that the property specially benefited by this public improvement shall not be permitted to escape payment of its proportionate share of benefits received. It will be assumed that the park commission will do its full duty, and no writ will issue, and the judgment appealed from will be set aside. As but city officials are involved, and the question has been only one of

regularity of the exercise of power by one or the other of two city boards, no costs on trial or on appeal will be taxed, and the proceeding will be dismissed.

STATE OF NORTH DAKOTA EX REL. HENRY J. LINDE, Attorney General, and B. V. Moore, Relator, v. W. C. TAYLOR, Commissioner of Insurance of the State of North Dakota, and as Such Commissioner, John Steen, State Treasurer of the State of North Dakota, and as Such Treasurer, and J. G. Johnson, State Examiner of the State of North Dakota, and as Such Examiner.

(L.R.A. —, —, 156 N. W. 561.)

Supreme court — prerogative jurisdiction — questions involved — public juris — state sovereignty — franchises — prerogatives — liberties of the people — private rights.

1. The prerogative jurisdiction of the supreme court may be exercised only in cases wherein the questions involved are *publici juris*, and the sovereignty of the state, or its franchises or prerogatives, or the liberties of its people, are affected; and this jurisdiction cannot be exercised to vindicate or protect mere private rights regardless of their importance.

Supreme court — original proceedings in — state is plaintiff — relator a mere incident.

2. In an original proceeding in the supreme court, the state is the actual plaintiff, and the relator, a mere incident.

Legislature — acts — validity — test — state and Federal Constitutions — violations — express or implied.

3. The only test of the validity of an act regularly passed by a state legislature is whether it violates any of the express or implied restrictions of the state or Federal Constitutions.

Wisdom — necessity — propriety — expediency — legislation — questions for the legislature — not judicial.

4, 10. The wisdom, necessity, or expediency of legislation are matters for legislative, and not judicial, consideration.

State bonding fund — official bonds — for county — city — public officials — judicial powers — state examiner — commissioner of insurance.

5. Chapter 62 of the Laws of 1915, establishing a state bonding fund for the purpose of furnishing official bonds for county, city, village, school district,

and township officers is not unconstitutional, as conferring judicial powers on the state examiner and commissioner of insurance.

Laws — public policy — violation of — legislature — limitation — state constitution — Federal Constitution.

6. Courts are not at liberty to declare a law void as in violation of public policy. Such policy is determined by the legislature, and the only limits upon the legislative power in such determination are those fixed in the state and Federal Constitutions.

Legislative powers — delegation of — insurance commissioner — state auditing board.

7. Chapter 62, Laws 1915, is not invalid on account of delegating legislative power to the commissioner of insurance and state auditing board.

Statutory interpretation — construction — object of — legislative intention — effect given to.

8. The object of all statutory interpretation and construction is to ascertain and give effect to the intention of the legislature.

Valid law — presumption — legislative intent — construction — open to different — method of.

9. It is presumed that the legislature intended to enact a valid law, and, therefore, when a statute is susceptible of two constructions, one of which will render it valid and another which will render it unconstitutional and void, the former construction will be adopted.

Constitutional inhibitions — taking of private property — due process of law — guarantees — equal rights — privileges — benefits — who may claim.

11. All constitutional inhibitions against the taking of private property without due process of law, and all constitutional guarantees of equal rights and privileges, are for the benefit of those persons only whose rights are affected, and cannot be taken advantage of by any other persons.

Supreme Court — original proceeding — law — constitutionality — conditions anticipated — courts — whole act — validity of.

12. In an original proceeding in the supreme court, wherein a law is assailed as being unconstitutional, the court will not anticipate conditions which may never arise, or determine questions relating to the validity of minor provisions as to detail, but will consider only those questions which relate to the validity of the whole act.

Constitution — laws — general nature — uniform operation.

13. Chapter 62, Laws 1915, is not violative of § 11 of the State Constitution, which requires that all laws of a general nature shall have a uniform operation.

Constitution — money — State Treasury — appropriation — warrant.

14. Said chapter 62 does not contravene § 186 of the Constitution, which provides that no money shall be paid out of the state treasury except upon an appropriation by law, and on warrant drawn by the proper officers.

Constitutional guarantee — express — implied — self-government — local.

15. Said chapter 62 does not violate any express or implied constitutional guaranty of the right of local self-government.

Constitution — taxation — moneys — expenditure.

16. Said chapter 62 does not contravene §§ 175, 176, or 179 of the State Constitution, relating to taxation and the expenditure of moneys raised by taxation.

Levy of taxes — collection of — purposes — public — private property — private use — compensation.

17. Said chapter 62 does not require taxes to be levied and collected for other than public purposes, or authorize the taking of private property for private use without compensation.

Municipal officers — bonding fund — premiums — losses — public officers — police power of State — exercise of.

18. The establishment and operation of a fund for the bonding of municipal officers and the collection of premiums from the various municipalities whose officers are bonded for the purpose of creating a fund to secure the payment of losses which may result by reason of the nonfeasance, misfeasance, or defalcation of such public officers, is a valid exercise of the police power of the state.

Opinion filed February 5, 1916.

Original proceedings in this court by the State on the relation of B. V. Moore, for the issuance of a writ prohibiting and enjoining the Commissioner of Insurance, State Treasurer, and State Examiner from establishing and operating a state bonding fund, as required by chapter 62, Laws of 1915.

Writ denied.

Lawrence & Murphy, for plaintiffs.

The act contains an unwarranted delegation of judicial power to the state examiner and to the commissioner of insurance. *State ex rel. Miller v. Taylor*, 27 N. D. 77, 145 N. W. 428.

This is a proceeding not *in rem*, but *in personam*. The only way to secure personal service is to make such service *personal*. In such cases where personal rights and obligations of parties are to be determined

personal service within the state, or a voluntary appearance in the cause, is essential to jurisdiction. *D'Arcy v. Ketchum*, 11 How. 174, 13 L. ed. 652; *Webster v. Reid*, 11 How. 437, 13 L. ed. 761; *Cooper v. Reynolds*, 10 Wall. 316, 19 L. ed. 932; *Pennoyer v. Neff*, 95 U. S. 714, 24 L. ed. 565; *St. Clair v. Cox*, 106 U. S. 353, 27 L. ed. 223, 1 Sup. Ct. Rep. 354; *Pana v. Bowler*, 107 U. S. 529, 27 L. ed. 424, 2 Sup. Ct. Rep. 704; *Hart v. Sansom*, 110 U. S. 151, 28 L. ed. 101, 3 Sup. Ct. Rep. 586; *Grover & B. Sewing Mach. Co. v. Radcliffe*, 137 U. S. 294, 34 L. ed. 671, 11 Sup. Ct. Rep. 92; *Wilson v. Seligman*, 144 U. S. 41, 36 L. ed. 338, 12 Sup. Ct. Rep. 541; *McGehee*, *Due Process of Law*, 89, 90; *State ex rel. Miller v. Taylor*, 27 N. D. 77, 145 N. W. 430; *Galpin v. Page*, 18 Wall. 350, 21 L. ed. 959; *Hovey v. Elliott*, 167 U. S. 409, 42 L. ed. 215, 17 Sup. Ct. Rep. 841.

In actions *in personam* of a strictly judicial character, and proceeding according to the common law, service of summons by publication, on resident defendants, who are within the state and can be found in state, is not "due process of law." *Bardwell v. Collins* (*Bardwell v. Anderson*), 44 Minn. 97, 9 L.R.A. 154, 20 Am. St. Rep. 547, 46 N. W. 315; *Moredock v. Kirby*, 118 Fed. 186; *Bear Lake County v. Budge*, 9 Idaho, 703, 108 Am. St. Rep. 179, 75 Pac. 614.

Under the police power of the state, the legislature cannot authorize a public officer to bring a suit to settle private rights to the use of water or the priority of such rights. *Bear Lake County v. Budge*, *supra*; *Brown v. Levee Comrs.* 50 Miss. 468.

The act is unlawful, discriminating, and contains arbitrary classifications. It amounts to special legislation. *State ex rel. McKell v. Robins*, 71 Ohio St. 273, 69 L.R.A. 427, 73 N. E. 470, 2 Ann. Cas. 485; *Vermont Loan & T. Co. v. Whithed*, 2 N. D. 82, 49 N. W. 318.

No moneys can be drawn from the state treasury with, first, an appropriation for the purpose, and, second, only upon allowance of the claim with and by the state auditing board. The act in question is void in that provision is not made for either of these things to be done. Const. § 186.

The act constitutes a legislative interference with local and municipal affairs. The legislature is supreme only in matters of purely legislative concern. The economic affairs of local municipalities is another matter entirely, likened unto the personal concerns of the individual. Conlin

v. San Francisco, 99 Cal. 17, 21 L.R.A. 474, 37 Am. St. Rep. 17, 33 Pac. 753; Lund v. Chippewa County, 93 Wis. 640, 34 L.R.A. 131, 67 N. W. 927; People ex rel. LeRoy v. Hurlbut, 24 Mich. 44, 9 Am. Rep. 103; Oakley v. Aspinwall, 3 N. Y. 568.

The act violates various provisions of the state Constitution with reference to taxation and the expenditure of moneys raised by taxation. Const. §§ 175, 176, 179; People ex rel. Twitchell v. Blodgett, 13 Mich. 139.

Every tax raised must not only be for a public purpose, but it must be for a *local* public purpose and expended in the district in which it was raised. Taxes are thus reciprocal in their nature. Weeks v. Milwaukee, 10 Wis. 243; Ryerson v. Utley, 16 Mich. 269; Merrick v. Amherst, 12 Allen, 504; Wells v. Weston, 22 Mo. 384, 66 Am. Dec. 627; Covington v. Southgate, 15 B. Mon. 491; Morford v. Unger, 8 Iowa, 82; Stetson v. Kempton, 13 Mass. 272, 7 Am. Dec. 145; People v. Albany, 11 Wend. 539, 27 Am. Dec. 95; Parsons v. Goshen, 11 Pick. 396; Anthony v. Adams, 1 Met. 284; Weismer v. Douglas, 64 N. Y. 99, 21 Am. Rep. 586.

It is the essence of taxation that it should compel the discharge of a burden by those upon whom it rests. 1 Desty, Taxn. 285, 287; Farris v. Vannier, 6 Dak. 186, 3 L.R.A. 713, 42 N. W. 31.

The act is wrong, because it provides for a tax to create a fund for *future* distribution. State ex rel. Owen v. Donald, 160 Wis. 21, 151 N. W. 331.

The state cannot engage in private business. The purpose of the formation of government is to *govern*; but the state cannot arrogate to itself, the *rights* of the *people*. Citizens' Sav. & L. Asso. v. Topeka, 20 Wall. 661, 22 L. ed. 461; Ex parte Merryman, Taney, 246, Fed. Cas. No. 9487; Re Pacific R. Commission, 32 Fed. 254; 3 Adam Smith, Wealth of Nations, 545; 1 Kent, Com. p. 450; Herman v. State, 8 Ind. 548; State ex rel. Coleman v. Kelly, 71 Kan. 811, 70 L.R.A. 450, 81 Pac. 457, 6 Ann. Cas. 298; Butchers' Benev. Asso. v. Crescent City L. S. L. & S. H. Co. 16 Wall. 111, 21 L. ed. 420; McCullough v. Brown, 41 S. C. 220, 23 L.R.A. 410, 19 S. E. 458; State ex rel. George v. Aiken, 42 S. C. 222, 26 L.R.A. 357, 20 S. E. 221; Rippe v. Becker, 56 Minn. 100, 22 L.R.A. 857, 57 N. W. 331; State ex rel. Monnett v. Guilbert, 56 Ohio St. 575, 38 L.R.A. 524, 60 Am. St. Rep. 756, 47 N.

E. 551; State ex rel. Toledo v. Lynch, 88 Ohio St. 71, 48 L.R.A. (N.S.) 720, 102 N. E. 673, Ann. Cas. 1914D, 949.

No municipality is a "trading corporation." Such corporations are invested with public trusts of governmental and administrative character. Nashville v. Ray, 19 Wall. 476, 22 L. ed. 169; Elliott, Constitutional Debates, N. D. 438; Winspear v. District Twp. 37 Iowa, 544; Thomas v. Taylor, 42 Miss. 706, 2 Am. Rep. 625.

Henry J. Linde, Attorney General, *Francis J. Murphy*, and *H. R. Bitzing*, Assistant Attorneys General, for defendants.

The amount to be paid each year for additional help made necessary by the extra work of the offices named, is unconditionally limited to a fixed sum, and is in no sense uncertain or speculative, and cures the defect in the former law, of which complaint was made and sustained. Act of 1915, § 14; State ex rel. Miller v. Taylor, 27 N. D. 77, 145 N. W. 425.

Where there is no constitutional limitation in a state Constitution against the doing of certain acts, the people, through the legislature, have a right to do such acts. State ex rel. Board of Regents v. Ekern, 159 Wis. 319, 150 N. W. 506.

CHRISTIANSON, J. This is an original proceeding in this court against the commissioner of insurance, state treasurer, and state examiner to prevent them from putting into operation chapter 62 of the Session Laws of 1915, on the ground that this act is unconstitutional.

This act establishes a state bonding fund for the purpose of bonding such county, city, village, school district, and township officers as are, or may hereafter be required by law, to furnish official bonds; provides the form of bond, the amount of premiums to be paid, and fixes the maximum amount of any bond to be written at \$50,000; and prescribes certain duties to be performed by the commissioner of insurance, state treasurer, and state examiner in the organization and operation of such state bonding fund.

The relator is a qualified elector, freeholder, and taxpayer in the city of Fargo, Cass county, in this state, and a stockholder in the Dakota Trust Company, a corporation organized under the laws of this state, and since December, 1908, engaged in the business of issuing surety and indemnity bonds (among others), to state, county, city, and school dis-

trict officers in this state. The relator asserts that the act in question is unconstitutional for the following ten reasons:—”

I. The act contains an unwarranted delegation of judicial power to the state examiner and to the commissioner of insurance.

II. If the act does not contain a specific and unwarranted delegation of judicial power as stated, it is then void as a matter of public policy in that no provision is made for the payment of losses, except by litigation and the use of the courts of the state in every instance before money can be withdrawn from the state treasury.

III. The act contains an unwarranted delegation of legislative power to the commissioner of insurance and to the state auditing board in the determination of the amount of public moneys to be used for particular purposes.

IV. If the act does not contain a specific delegation of unwarranted legislative power as referred to in the preceding proposition, then the act is wholly ineffective, inoperative, and impossible of performance because of lack of means and funds to conduct the same without devoting thereto other public moneys.

V. The act deprives citizens of the state of the constitutional right of due process of law in requiring the appointment of an attorney in fact upon whom service of judicial process may be made.

VI. The act contains wrongful and unlawful discrimination and arbitrary classifications.

VII. The act is void in that it provides for a withdrawal of moneys from the state treasury without appropriation, presentation of, or allowance of, a claim filed with the state auditing board.

VIII. The act constitutes a legislative interference with local and municipal affairs.

IX. The act violates various provisions of the state Constitution with reference to taxation and the expenditure of moneys raised by taxation.

X. This legislation as a whole violates the fundamental law in that it engages the sovereign state in a private business in competition with the citizens of the state.”

Before entering into a discussion of the questions raised by the relator, it is proper to consider the scope and purpose of the litigation, and the rules which must be applied in its determination.

(1) The relator has invoked the original jurisdiction of this court. It is well settled that this jurisdiction will not be exercised to vindicate private or local rights regardless of their importance, but it is reserved for the use of the state itself when it appears to be necessary to vindicate or protect its prerogatives or franchises, or the liberties of its people.

"The jurisdiction," said Morgan, Ch. J. (*State ex rel. Steel v. Fabrick*, 17 N. D. 532, 536, 117 N. W. 860), "is not to be exercised unless the interests of the state are directly affected. Merely private rights are not enough on which to base an application for the issuance of original writs by this court. The rights of the public must appear to be directly affected. The matters to be litigated must not only be *publici juris*, but the sovereignty of the state, or its franchises or prerogatives, or the liberties of its people, must be affected. Before the court will, in the exercise of its original jurisdiction, issue prerogative writs, there must be presented matters of such strictly public concern as involve the sovereign rights of the state, or its franchises or privileges. The often-quoted statement of the rule as to the original jurisdiction of the supreme court to issue writs of a prerogative character, as given in *Atty. Gen. v. Eau Claire*, 37 Wis. 400, is well expressed and clear: 'To warrant the assertion of original jurisdiction here, the interest of the state should be primary and proximate, not indirect or remote; peculiar, perhaps, to some subdivision of the state, but affecting the state at large in some of its prerogatives; raising a contingency requiring the interposition of this court to preserve the prerogatives and franchises of the state in its sovereign character.' This statement of the rule has been approved in many cases in this court."

(2) While it is true that the relator in this case, in his capacity of a citizen and taxpayer of the state, has a sufficient interest to invoke this court's prerogative jurisdiction as a relator, still the real plaintiff is the state. The private relator, in his capacity as a citizen and taxpayer, merely informs the court of the infringement which has been or is about to be made upon the sovereignty of the state, or its franchises or prerogatives, or the liberties of its people, and the court by virtue of the power granted by the Constitution commands that the suit be brought by and for the state, even though the attorney general may refuse to bring this action or consent to its institution.

"This transcendent jurisdiction is a jurisdiction reserved for the use

of the state itself when it appears to be necessary to vindicate or protect its prerogatives or franchises, or the liberties of its people; the state uses it to punish or prevent wrongs to itself or to the whole people; the state is always the plaintiff and the only plaintiff, whether the action be brought by the attorney general, or, against his consent, on the relation of a private individual under the permission and direction of the court. It is never the private relator's suit; he is a mere incident; he brings the public injury to the attention of the court, and the court, by virtue of the power granted by the Constitution, commands that the suit be brought by and for the state. The private relator may have a private interest which may be extinguished (if it be severable from the public interest), yet still the state's action proceeds to vindicate the public right." *State ex rel. Bolens v. Frear*, 148 Wis. 456, 500, L.R.A.1915B, 569, 134 N. W. 673, Ann. Cas. 1913A, 1147.

Not only is the prerogative jurisdiction of this court invoked, but in the exercise of that jurisdiction, we are asked to declare a legislative enactment void, and restrain administrative officers of this state from performing the duties which the legislature has assigned to them by such enactment. In this case, therefore, this court is called upon to exercise the two highest powers entrusted to it by the sovereign authority—the people—under the Constitution of this state: (1) Its prerogative jurisdiction; (2) to declare invalid an act of a co-ordinate department of the government. "The power to pass upon the constitutionality of laws when the question arises in the course of ordinary litigation is a great power, one to be exercised with the greatest possible caution and wisdom; but the power to take up and pass upon a law involving the expenditure of any state funds as soon as it is passed, at the suggestion of any taxpayer, and place a judicial veto upon its execution, is a still greater one. No higher power than this can well be conceived in a government such as ours; certainly no power will demand greater wisdom in its exercise, if it exists." (*State ex rel. Bolens v. Frear*, 148 Wis. 456, L.R.A.1915B, 569, 134 N. W. 673, Ann. Cas. 1913A, 1147.)

"The legislative and judicial," said Cooley (*Cooley, Const. Lim.* 7th ed. pp. 227, 228)," are co-ordinate departments of the government, of equal dignity; each is alike supreme in the exercise of its proper functions, and cannot directly or indirectly, while acting within the limits of its authority, be subjected to the control or supervision of the other,

without an unwarrantable assumption by that other of power which, by the Constitution, is not conferred upon it. The Constitution apportions the powers of government, but it does not make any one of the three departments subordinate to another, when exercising the trust committed to it. The courts may declare legislative enactments unconstitutional and void in some cases, but not because the judicial power is superior in degree or dignity to the legislative. Being required to declare what the law is in the cases which come before them, they must enforce the Constitution as the paramount law, whenever a legislative enactment comes in conflict with it.

“But the courts sit not to review or revise the legislative action, but to enforce the legislative will; and it is only where they find that the legislature has failed to keep within its constitutional limits, that they are at liberty to disregard its action; and in doing so, they only do what every private citizen may do in respect to the mandates of the courts when the judges assume to act and to render judgments or decrees without jurisdiction. ‘In exercising this high authority, the judges claim no judicial supremacy; they are only the administrators of the public will. If an act of the legislature is held void, it is not because the judges have any control over the legislative power, but because the act is forbidden by the Constitution, and because the will of the people, which is therein declared, is paramount to that of their representatives expressed in any law.’ . . . It is a solemn act in any case to declare that that body of men to whom the people have committed the sovereign function of making the laws for the commonwealth have deliberately disregarded the limitations imposed upon this delegated authority, and usurped power which the people have been careful to withhold; and it is almost equally so when the act which is adjudged to be unconstitutional appears to be chargeable rather to careless and improvident action, or error in judgment, than to intentional disregard of obligation.”

(3) Every reasonable presumption is in favor of the constitutionality of a statute enacted by the legislature. 8 Cyc. 801; *O’Laughlin v. Carlson*, 30 N. D. 213, 152 N. W. 675. This presumption is conclusive, unless it is clearly shown that the enactment is prohibited by the Constitution of the state or of the United States. (*Cooley*, Const. Lim. 7th ed. 242; 8 Cyc. 801.) The only test of the validity of an act regularly passed by a state legislature is whether it violates any of the

express or implied restrictions of the state or Federal Constitutions. 8 Cyc. 776; Cooley, Const. Lim. 7th ed. pp. 232-241; *Re Watson*, 17 S. D. 486, 97 N. W. 463, 2 Ann. Cas. 321; *Ratcliff v. Wichita Union Stockyards Co.* 74 Kan. 1, 6 L.R.A.(N.S.) 834, 118 Am. St. Rep. 298, 86 Pac. 150, 10 Ann. Cas. 1016; *State ex rel. Nichols v. Cherry*, 22 Utah, 1, 60 Pac. 1103; *Ex parte Boyce*, 27 Nev. 299, 65 L.R.A. 47, 75 Pac. 1, 1 Ann. Cas. 66. And he who alleges a statute to be unconstitutional must be able to point to the particular constitutional provision violated. *Missouri River Power Co. v. Steele*, 32 Mont. 433, 80 Pac. 1093; *State v. Wilson*, 124 Iowa, 264, 99 N. W. 1060; 8 Cyc. 800.

In discussing the difference between the Constitution of the United States and the Constitution of the states, as regards the legislative powers which may be exercised under them, Cooley (Cooley, Const. Lim. 7th ed. 242), said: "We look in the Constitution of the United States for grants of legislative power, but in the Constitution of the state to ascertain if any limitations have been imposed upon the complete power with which the legislative department of the state was vested in its creation. Congress can pass no laws but such as the Constitution authorizes, either expressly or by clear implication; while the state legislature has jurisdiction of all subjects on which its legislation is not prohibited. 'The lawmaking power of the state,' it is said in one case, recognizes no restraints and is bound by none except such as are imposed by the Constitution. That instrument has been aptly termed a legislative act by the people themselves in their sovereign capacity, and is therefore the paramount law. Its object is not to grant legislative power, but to confine and restrain it. Without the constitutional limitations, the power to make laws would be absolute. These limitations are created and imposed by express words or arise by necessary implication."

Under our Constitution "all governmental power is vested in the legislature, except such as is granted to the other departments of the government, or expressly withheld from the legislature by constitutional restrictions." *State ex rel. Standish v. Boucher*, 3 N. D. 389, 395, 21 L.R.A. 539, 56 N. W. 142, 144; *O'Laughlin v. Carlson*, 30 N. D. 213, 152 N. W. 675.

Bearing these well-known principles in mind, we approach the questions presented for our determination in this case.

It is true as relator's counsel asserts that an act establishing a state bonding department adopted by the legislature of this state in 1913 was held to be unconstitutional by this court in *State ex rel. Miller v. Taylor*, 27 N. D. 77, 145 N. W. 425. It is also doubtless true, as relator's counsel contends, that the present act was adopted for the purpose of accomplishing the same object sought to be accomplished by the former act, and that the changes in the present act were intended to obviate the constitutional violations adjudged to exist in the former act. These facts, however, do not change the rules which must be applied in determining the constitutionality of the statute under consideration. The legislators who enacted the present act were sworn to support both the state and Federal Constitutions, and to faithfully discharge their duties of office. They are presumed to have performed their sworn duty. These legislators knew the constitutional objections to the former act. We cannot presume that (possessed of this knowledge) they intentionally enacted a law violative of the Constitution. The presumption is that they enacted a valid and constitutional law.

Relator's counsel, also, condemns the present act as a piece of unwise and ineffective legislation, and asserts that improper motives on the part of the legislators (or some of them) caused its enactment. In relator's brief it is said that "this piece of legislation comes to us in a form and under circumstances that call for no sympathy, nor is it deserving of any generosity of construction. This legislative child is a hopeless physical cripple and a moral degenerate from the time of its birth, and must have been conceived because of personal desires of revenge or like ulterior motives, because its author has apparently deliberately sent it forth with the intent that its body should be deformed to the extent that it cannot properly move, and the wrong which it is claimed to remedy is permitted to be exercised against the very persons whom it is claimed it is designed to protect." It is therefore asserted that "little weight should be given to any asserted claim that this is salutary, beneficial, or effective legislation." And "that no sympathy is to be extended by way of construction to this wholly ineffective piece of legislation which can only be termed . . . a physical cripple."

(4) The courts are not concerned with the wisdom, necessity, or expediency of legislation. These are matters for the legislature. 8 Cyc. 776, 851. The motives of the legislators cannot be inquired into

in determining the constitutionality of a statute. "Ignorance or improper motives in the enactment of legislation are never imputed to the legislature. The courts will conclusively presume that no general laws are ever passed either through want of information on the part of the legislature, or because it was misled by false representations of interested parties; and a statute which violates, neither expressly nor by necessary implication, any constitutional provision, is itself conclusive evidence of its propriety and justice." 8 Cyc. 804, 851.

While the motives of the legislators are not subject to judicial inquiry in determining the validity of legislation, it may be mentioned that the act under consideration was first passed in the state senate by a vote of forty-one ayes to five nays, three being absent and not voting. It thereafter passed the house of representatives, with certain amendments, by a vote of seventy-four ayes to twenty-one nays, seventeen being absent and not voting; and on its return to the senate, the act, as amended by the house of representatives, was passed by the senate by a vote of thirty-six ayes to ten nays, three being absent and not voting.

(5) It is contended that the statute under consideration is invalid as an unwarranted delegation of judicial power to the state examiner, and the commissioner of insurance. This court sustained a similar objection to the 1913 act, and held the same invalid "as an unwarranted delegation of judicial power to purely administrative officials, in that it commits to the commissioner of insurance the sole right to determine the amount due subdivisions whose officials are insured, by reason of any default or violation of official duties, and also delegates to the auditing board the power to determine when bonds of insured officials shall be canceled, which are judicial functions."

The present act contains the following provisions:

"Section 10. All such official bonds shall run to the political subdivision of which the bonded official is an officer, as obligee, and such bonds shall be construed as provided in § 680 of the Compiled Laws of North Dakota 1913, and any private corporation or person suing such official may recover under such bond and have the protection of the state bonding fund.

"Section 11. Any obligee or private corporation or person may sue upon any such official bond issued by the commissioner of insurance and may join the commissioner of insurance as a codefendant with the

defaulting officer and in case judgment is obtained against such defaulting officer, the judgment shall further specify that such judgment shall be paid out of any funds on hand in the state bonding fund, or that may thereafter accrue to such fund. In case a judgment is paid out of the state bonding fund in any such action, the state bonding fund shall be subrogated under the judgment to the right of the judgment creditor to recover against the defaulting officer. In all proceedings to enforce such right of subrogation the commissioner of insurance as nominal defendant shall act for and in behalf of the state bonding fund; and he may in any action or proceedings appeal from any appealable order or from any judgment against said state bonding fund the same as is provided for other parties to civil actions. . . .

"Section 13. The bonds issued in pursuance of this act shall be construed and held to inure to the benefit of not only the political subdivisions named as obligee, but also to the benefit of any person damaged by any wrongful act or omission of the bonded official; and any person so damaged may, in an action upon the bond brought in his own name as plaintiff against the official bonded, join the commissioner of insurance as a codefendant, and thereby subject the state bonding fund to the payment of any judgment so obtained. . . .

"Section 15. Whenever a loss shall occur in any county, city, village, township or school district by the default of any officer of the same whose fidelity has been insured under the provisions of this act, it shall be the duty of the county auditor, city auditor, village, township or school district clerk or treasurer in case the defaulting officer is the auditor or clerk, as the case may be, immediately to notify the commissioner of insurance. The commissioner of insurance shall thereupon notify the state examiner; and it shall be the duty of the state examiner when so notified to check the accounts of such defaulting official and file a report with the commissioner of insurance.

"Section 16. . . . In case there shall not be a sufficient amount in the state bonding fund to pay the losses sustained after the reservation of funds to cover clerical assistance and other incidental expenses for the conduct of the bonding department for the year, such losses shall be paid as soon as sufficient funds are accumulated in the State Bonding Fund by collection of premiums. . . .

"Section 20. In case any official shall default, it shall be the duty of

the state examiner immediately to check the accounts of such defaulting official and file a report with the commissioner of insurance stating the amount due upon such defaulting officer's bond and for such services he shall be paid out of the state bonding fund, the same fees as he is paid for examining the accounts of county officers.

"Section 21. If at any time the commissioner of insurance shall be of the opinion that the interests of the state bonding fund are jeopardized by the misconduct or inefficiency of any bonded official, it shall be his duty to cause an action for an accounting to be instituted against such bonded official for the purpose of requiring a complete disclosure of the business of the office of which such official is an incumbent. Such action shall be brought in the name of the commissioner of insurance as plaintiff and the court may in such action interplead the obligee and render such judgment as shall protect the rights of all parties concerned. If at any time the commissioner of insurance deems it advisable, it shall be his duty to make a complaint to the governor requesting the governor to institute an investigation with the purpose of removing from office any defaulting official or any official who so conducts the affairs of his office as to endanger the state bonding fund. . . .

"Section 23. When any official applies to the commissioner of insurance for the issuance to him of an official bond, the commissioner of insurance may, after due investigation, reject such application if in his judgment the interests of the state bonding fund require such action. In such case the official whose application is rejected may secure a bond executed either by private surety or by a duly authorized surety company, but no officer or board of any political subdivision shall have the power to disburse public funds to pay the premium on such bonds.

"Section 24. The commissioner of insurance shall immediately notify the applicant of such rejection by registered mail, and the applicant shall have twenty days after the receipt of such notice within which to take an appeal from such decision of the commissioner of insurance to the district judge of the judicial district in which the applicant resides. The judge of said court shall hear such appeal at a day to be fixed by him not less than ten nor more than thirty days after the filing of the appeal with the clerk. The case shall be tried by the court without a jury. Notice of such appeal shall be served by the appellant upon the commissioner of insurance."

Do these provisions delegate unwarranted judicial powers to the state examiner and commissioner of insurance in violation of the constitutional inhibition? We think not. The state can act only through its officers. If the bonding fund sought to be established by the legislature is to be operated at all, such operation necessarily must be carried on through some officer or officers. The commissioner of insurance is the officer to whom the duty has been assigned to operate the state bonding fund. Actions upon claims against the bonding fund are maintainable against him; and he may also institute certain actions in behalf of the state bonding fund. It is self-evident that, in order to properly defend or maintain such actions, and intelligently perform the duties assigned to him, the commissioner of insurance must obtain the necessary preliminary information. To obtain such information it would frequently, or generally, be necessary to have the books and accounts of the defaulting officer examined and audited. This is obviously proper work for an expert accountant. The need of an expert accountant to examine the books and accounts of the various state officials and state institutions, as well as the books and accounts of county and city officers, banks and trust companies, has long been recognized, and the state has provided such expert accountant in the state examiner.

The act under consideration merely provides that the state examiner shall, when notified by the commissioner of insurance, check the accounts of the defaulting official and file a report of his examination with the commissioner of insurance. The findings of the state examiner are not made binding upon anyone. They are not even given any specific or unusual evidentiary force or effect. The state examiner's report is merely intended for the information of the commissioner of insurance. The duties and powers conferred upon the state examiner under the provisions of this act are no more judicial in character, and call for the exercise of no different powers, than those which he is required to exercise in the discharge of his usual duties, in examination of the books and accounts of the various state officials, state institutions, municipal officers, and banks, trust companies, and other corporations which are subject to examination by him under the laws of this state. Nor is the commissioner of insurance invested with power to make a binding determination upon any claims or rights which may arise in favor of, or against, the state bonding fund, but the legislature has

expressly reserved to every person and municipality the right to obtain a judicial determination of any question of a judicial or quasi judicial nature which may arise in the transactions with the commissioner of insurance in his administration of the state bonding fund.

It is true the people of this state, through their Constitution, have created three co-ordinate departments of government, each supreme in its own sphere, and that the judicial power is vested in the courts. This, however, does not necessarily mean that every act involving the exercise of judgment upon law and fact must be submitted to a court in the first instance. Many boards are permitted to exercise such judgment. In fact there are few, if any, administrative boards or officers who are not at times required (in the first instance), to exercise such judgment. Thus a board of drain commissioners is permitted to determine (among other things) (1) whether there is sufficient cause for the petition for a proposed drain; or whether the cost of the proposed drain will exceed the amount of benefit to be derived therefrom; (2) what lands are benefited by the construction of the drain, and apportion the cost thereof to the lands benefited, according to the benefits. This court has said that the drain commissioners, in performing these acts, are exercising functions judicial or quasi judicial in their nature. (*State ex rel. Dorgan v. Fisk*, 15 N. D. 219, 107 N. W. 191; *Bergen Twp. v. Nelson County*, — N. D. —, 156 N. W. 559.) And this court has also said that "the legislature had the undoubted power to commit to the drainage board the ascertainment of the lands to be assessed, as well as the apportionment of benefits." *Erickson v. Cass County*, 11 N. D. 494, 507, 92 N. W. 841.

The auditing of claims against a public corporation is generally considered a quasi judicial act. 28 Cyc. 1750; *State ex rel. Barber Asphalt Paving Co. v. District Ct.* 90 Minn. 457, 97 N. W. 132. Still the power to pass upon, and allow or disallow, claims is generally conferred upon some administrative board or body. 28 Cyc. 1748 et seq. Thus in this state, claims against the state are audited by the state auditing board; claims against a county by the board of county commissioners; and claims against a city by the city council. These respective boards determine in the first instance whether a claim presented constitutes an obligation against the public corporations they represent. If there is no dispute as to the claim, it is ordered paid; and

except in unusual cases, as when the officers have acted fraudulently, the matter ends there, and no further determination of the validity of amount of the claim is required. If a claim is rejected, the claimant is given the right to obtain an adjudication by a judicial tribunal.

Not only has the performance of these and similar duties been recognized in this state as a proper function of administrative boards or officers (and we are aware of no instance wherein the power so conferred has been challenged as an unwarranted delegation of judicial power), but it has even been provided by our statute that a claim against a city for personal damages or injuries by reason of defective streets, sidewalks, etc., must be presented to the city authorities within a limited time from the happening of the injury, and that no action can be maintained against the city unless such claim has first been presented as provided by law. Comp. Laws 1913, §§ 3627, 3628. See also *Coleman v. Fargo*, 8 N. D. 69, 76 N. W. 1051; *Johnson v. Fargo*, 15 N. D. 525, 108 N. W. 243, 20 Am. Neg. Rep. 460; *Pyke v. Jamestown*, 15 N. D. 157, 107 N. W. 359; *Tonn v. Helena*, 42 Mont. 127, 36 L.R.A. (N.S.) 1136, 111 Pac. 715, 3 N. C. C. A. 437.

The same departments of government created by, and the same distribution of governmental power made in, the Constitution of this state, were also created by, and made in, the Federal Constitution. In the case of *Den ex dem. Murray v. Hoboken Land & Improv. Co.* 18 How. 272, 279, 15 L. ed. 372, 376, the United States Supreme Court was called upon to determine whether an act which authorized the treasury department through its proper officers to audit the accounts of a collector of customs, ascertain the balance due from such collector to the government, and issue a distress warrant therefor, delegated judicial powers in violation of the Constitution. In considering this point the court said: "In support of this position, the plaintiff relies on that part of the 1st section of the 3d article of the Constitution which requires the judicial power of the United States to be vested in one supreme court and in such inferior courts as Congress may, from time to time, ordain and establish; the judges whereof shall hold their offices during good behavior, and shall, at stated times, receive for their services a compensation which shall not be diminished during their continuance in office. . . .

"It must be admitted that, if the auditing of this account, and the ascertainment of its balance, and the issuing of this process, was an

exercise of the judicial power of the United States, the proceeding was void; for the officers who performed these acts could exercise no part of that judicial power. They neither constituted a court of the United States, nor were they, or either of them, so connected with any such court as to perform even any of the ministerial duties which arise out of judicial proceedings.

"The question whether these acts were an exercise of the judicial power of the United States can best be considered under another inquiry, raised by the further objection of the plaintiff, that the effect of the proceedings authorized by the act in question is to deprive the party, against whom the warrant issues, of his liberty and property 'without due process of law;' and therefore is in conflict with the 5th article of the Amendments of the Constitution. . . .

"That the auditing of the accounts of a receiver of public moneys may be, in an enlarged sense, a judicial act, must be admitted. So are all those administrative duties the performance of which involves an inquiry into the existence of facts and the application to them of rules of law. In this sense the act of the President in calling out the Militia under the act of 1795 (*Martin v. Mott*, 12 Wheat. 19, 6 L. ed. 537), or of a commissioner who makes a certificate for the extradition of a criminal, under a treaty, is judicial. But it is not sufficient, to bring such matters under the judicial power, that they involve the exercise of judgment upon law and fact. *United States v. Ferreira*, 13 How. 40, 14 L. ed. 42. . . . We do not doubt the power of Congress to provide by law that such a question shall form the subject-matter of a suit in which the judicial power can be exerted. The act of 1820 makes such a provision for reviewing the decision of the accounting officers of the treasury. But, until reviewed, it is final and binding; and the question is whether its subject-matter is necessarily, and without regard to the consent of Congress, a judicial controversy. And we are of opinion it is not. . . .

"To avoid misconstruction upon so grave a subject, we think it proper to state that we do not consider Congress can . . . withdraw from judicial cognizance any matter which, from its nature, is the subject of a suit at the common law, or in equity, or admiralty. . . . At the same time there are matters involving public rights, which may be presented in such form that the judicial power is capable of acting on

them, and which are susceptible of judicial determination, but which Congress may or may not bring within the cognizance of the courts of the United States, as it may deem proper."

And in the recent case of *Ocampo v. United States*, 234 U. S. 91, 58 L. ed. 1231, 34 Sup. Ct. Rep. 712, an act conferring upon the prosecuting attorney power to investigate charges of crimes in lieu of preliminary examination before a magistrate was held not to be an unconstitutional delegation of judicial power. The court said: "It is insisted that the finding of probable cause is a judicial act, and cannot properly be delegated to a prosecuting attorney. We think, however, that it is erroneous to regard this function, as performed by committing magistrates generally, or under General Orders, No. 58, as being judicial in the proper sense. There is no definite adjudication. A finding that there is no probable cause is not equivalent to an acquittal, but only entitles the accused to his liberty for the present, leaving him subject to rearrest. . . . In short, the function of determining that probable cause exists for the arrest of a person accused is only quasi judicial, and not such that, because of its nature, it must necessarily be confided to a strictly judicial officer or tribunal." See also *Cunningham v. Northwestern Improv. Co.* 44 Mont. 180, 119 Pac. 554, 565, 1 N. C. C. A. 720; *Monongahela Bridge Co. v. United States*, 216 U. S. 177, 54 L. ed. 435, 30 Sup. Ct. Rep. 356; *Borgnis v. Falk Co.* 147 Wis. 327, 37 L.R.A.(N.S.) 489, 133 N. W. 209, 3 N. C. C. A. 649; *Com. v. Libbey*, 216 Mass. 356, 49 L.R.A.(N.S.) 879, 103 N. E. 923, Ann. Cas. 1915B, 659; *Bushnell v. Leland*, 164 U. S. 684, 41 L. ed. 598, 17 Sup. Ct. Rep. 209.

(6) The contention that the act is void as a matter of public policy is untenable. The declaration of the public policy of the state is generally a matter for legislative consideration. The only limits upon the legislative power in determining such policy are those fixed in the state and Federal Constitutions. See *Northern P. R. Co. v. Richland County*, 28 N. D. 172, L.R.A.1915A, 129, 148 N. W. 545; 6 Words & Phrases, 5813, et seq.; 4 Words & Phrases, 2d series, 27, et seq. See also *State v. Coyle*, 3 Okla. Crim. Rep. 50, 122 Pac. 243; *McAllister v. Fair*, 72 Kan. 533, 3 L.R.A.(N.S.) 726, 115 Am. St. Rep. 233, 84 Pac. 112, 114, 7 Ann. Cas. 973; *Vidal v. Philadelphia*, 2 How. 127, 197, 11 L. ed. 205, 233; *State ex rel. Starke County v. Laramore*, 175

Ind. 478, 94 N. E. 761, Ann. Cas. 1913B, 1296; *Schultz v. State*, 89 Neb. 34, 33 L.R.A.(N.S.) 403, 130 N. W. 972, Ann. Cas. 1912C, 495; *Allen v. Smith*, 84 Ohio St. 283, 95 N. E. 829, Ann. Cas. 1912C, 611; *Perkins v. Heert*, 158 N. Y. 306, 43 L.R.A. 858, 70 Am. St. Rep. 483, 53 N. E. 18; 29 Am. & Eng. Enc. Law, 2d ed. 569.

Ruling Case Law (6 R. C. L. § 108), states the law to be as follows: "It is generally recognized that the public policy of a state is to be found in its Constitution and statutes, and only in the absence of any declaration in these instruments may it be determined from judicial decisions. In order to ascertain the public policy of a state in respect to any matter, the acts of the legislative department should be looked to, because a legislative act, if constitutional, declares in terms the policy of the state, and is final so far as the courts are concerned. All questions of policy are for the determination of the legislature, and not for the courts; and there is no public policy which prohibits the legislature from doing anything which the Constitution does not prohibit. Hence the courts are not at liberty to declare a law void as in violation of public policy. . . . Where courts intrude into their decrees their opinion on questions of public policy they in effect constitute the judicial tribunals as lawmaking bodies in usurpation of the powers of the legislature."

In *Julien v. Model Bldg. Loan & Invest. Asso.* 116 Wis. 79, 61 L.R.A. 668, 92 N. W. 561, the supreme court of Wisconsin said: "We know of no ground upon which a constitutional legislative enactment can be rightly spoken of as contrary to public policy. What is and what is not public policy must obviously be determined by the written and the unwritten law, giving precedence to the former where the two are in conflict. . . . Laws are never said to be contrary to public policy in any other sense than contrary to constitutional policy. . . . Statutes are not tested by any rule of public policy. We look to the statutes as well as the unwritten law to determine what is and what is not public policy, and then we test acts *inter partes* by the result. If such acts are not directly the subject of legislation, we say they are contrary to public policy. When we leave constitutional limitations out of view, the will of the legislative branch of the government, when expressed, is the highest evidence of public policy. To judicially condemn its expressed will, when exercised within constitutional limitations, would be

the plainest kind of usurpation. . . . It is the province of the statesman, and not of the lawyer, to discuss, and of the legislature to determine what is best for the public good, and to provide for it by proper enactments. It is the province of the judge to expound the law, to declare public policy as he finds it in the unwritten and written law. Public policy is a proper ground for a decision only in the sense of the policy of the law, not in the sense of mere judicial notions as to what is best for the public good."

"All political power is inherent in the people. Government is instituted for the protection, security, and benefit of the people." (N. D. Const. § 2.) The executive, legislative, and judicial departments were created by the people through their Constitution to exercise the powers and perform the duties expressly or by necessary implication, conferred or imposed, by the Constitution. The officials designated, or authorized, by the people in the Constitution to operate the departments of government, are public servants, required to perform such service as the Constitution says they shall perform, and as the people through their Constitution have authorized their lawmaking representatives to impose upon them. And there are no powers inherent in any of the branches (executive, legislative, or judicial), nor duties to be evaded by any of them, "if such powers have been expressly withheld from it by the people, or duties have been imposed upon it by them; and therefore no duty can be evaded by the executive or judiciary if the people have authorized its imposition by the legislature, their lawmaking power on either of these branches." *Kermott v. Bagley*, 19 N. D. 345, 124 N. W. 397. The legislature has imposed no duty upon the courts under the state bonding fund act which might not be so imposed. See *Kermott v. Bagley*, *supra*. See also *Interstate Commerce Commission v. Brimson*, 154 U. S. 447, 38 L. ed. 1047, 4 Inters. Com. Rep. 545, 14 Sup. Ct. Rep. 1125.

(7-9) It is next contended that the act is invalid because it delegates unwarranted legislative powers to the commissioner of insurance and state auditing board. This objection is directed at § 14 of the act, which reads as follows: "It shall be the duty of the commissioner of insurance and the state auditing board to estimate at the beginning of each year the amount required for additional clerical help and incidental office expenses made necessary by the additional work devolving upon his

33 N. D.—7.

office on account of the provisions of this act for that year, which estimated amount shall be reserved from the premiums paid in and shall not exceed the sum of \$1,500 per annum. The amount of premium receipts remaining shall be used for the payment of losses; *provided* that if the amount reserved for clerical assistance and incidental expenses is more than sufficient to pay the same the excess shall be used to pay losses. The commissioner of insurance shall have the authority to engage clerical assistance to conduct the transactions provided for by this act. He shall also prepare and provide the necessary blanks, books, stationery and postage and cause the same to be delivered to the proper officers and persons. Such expenses and the salaries of such clerical assistance shall be audited and allowed by the state auditing board."

A similar objection was made to the 1913 act. The objection was sustained on the ground that the act then under consideration attempted "to give to the commissioner of insurance the arbitrary power to determine how much of such fund shall be applied to the payment of losses, and how much to the payment of deputies, clerk hire, and other expenses of the department, and, particularly, because no limitation is placed upon the amount which may be devoted to the last-mentioned subject." (See *State ex rel. Miller v. Taylor*, 27 N. D. 78, 84, 145 N. W. 425.)

Relator contends that the amount (not exceeding \$1,500), authorized to be expended "for clerical help and incidental office expenses" under the provisions of § 14 of the present act, applies only to salaries of clerks and incidental expenses connected with the office, and does not apply to other necessary expenses of organizing and operating the bonding fund, such as blanks, books, and stationery. And the relator contends that with respect to such latter expenses, the commissioner of insurance is given an unlimited authority to expend any amount of money which he may desire, and that therefore the decision of this court in holding the former act unconstitutional as an unwarranted delegation of legislative powers applies equally to the present act.

The province of the courts is to construe and interpret laws,—not to make them. If the language of a statute is clear and unambiguous, there is no room for construction, and the legislature must be presumed to have intended to say what it said. 36 Cyc. 1106, 1107; 26 Am. & Eng. Enc. Law, 598. This is so, even though the statute so understood

"leads to absurd and mischievous results . . .; for courts are not to inquire as to the motive of the legislature, nor to depart from a meaning clearly conveyed in unambiguous words, because the statute, as literally understood, appears to lead to unwise consequences or to contravene public policy." (26 Am. & Eng. Enc. Law, 599.) Construction or interpretation becomes necessary only in cases where an act is ambiguous or of doubtful meaning. The object of all interpretation and construction of statutes is to ascertain and give effect to the intention of the legislature. 36 Cyc. 1106; 26 Am. & Eng. Enc. Law, 597.

In order to ascertain the legislative intent it is proper to consider the occasion and necessity of the enactment, the defects or evils of the former law, and the mischief sought to be prevented or cured by the new legislation. "For this purpose the court should put itself in the place, at the time of its enactment, of the legislature which passed it, investigating the then existing state of the common or statutory law on the subject, contemporaneous circumstances, and the external or historical facts which led to its enactment, and make such application of the provisions of the statute as will best promote the object of the legislation. But it has been declared that it is only when the statute or its phraseology is ambiguous and such as to admit of two meanings that a historical investigation of this kind is permissible." (26 Am. & Eng. Enc. Law, 2d ed. 632. See also 36 Cyc. 1110.) The present law was enacted by the legislature to accomplish the purpose sought to be accomplished by the former act. It was introduced by the same senator who introduced the former act. It is presumed that the legislature, in passing the statute under consideration, "acted with a full knowledge of the constitutional scope of its powers, of prior legislation on the same subject, and its construction by the courts." 36 Cyc. 1135. See also 36 Cyc. 1153. It is presumed that the legislature intended to enact a valid law. And, therefore, when a statute is susceptible of two constructions, one of which will render it valid and another which will render it unconstitutional and void, the former construction will be adopted. 26 Am. & Eng. Enc. Law, 640; Cooley, Const. Lim. 255. These well-known rules are peculiarly applicable to the statutory provision under consideration. And by applying these rules, we reach the conclusion that the legislature did not intend to authorize the commissioner of insurance to expend to exceed \$1,500 per annum for all

expenses in his office, inclusive of clerical assistance and office supplies for operation of the state bonding fund.

(10) The relator next contends that it would be impossible to operate the state bonding fund for \$1,500 per year, and that this limitation upon operating expenses will render the act "wholly ineffective, inoperative, and impossible of performance because of lack of means and funds to conduct the same." The objection does not rest on constitutional grounds. It is not contended that any specific constitutional provision has been violated. The objection merely goes to the wisdom and policy of the legislation. The moneys to be expended in executing or administering a legislative enactment is peculiarly a matter for legislative determination. It is presumed that the legislature informed itself on the subject, and for reasons satisfactory to its judgment determined the amount of necessary operating expenses, and fixed the maximum thereof at \$1,500 per annum. See 6 R. C. L. §§ 111-113. With the wisdom of this legislation we are not concerned. The responsibility therefore rests upon the legislature, and not upon the courts; and it is difficult to see why the relator should complain because the legislature was too parsimonious in the allowance of operating expenses. If anyone has cause for complaint, it would be the commissioner of insurance, whose duty it is to operate the department. He, however, does not complain. But in his return herein he admits that he is about to perform the duties prescribed by the act; denies that the act is unconstitutional for any of the reasons assigned by the relator; he further admits "that he is permitted to employ clerks and servants to conduct the additional labor imposed upon his office by said act, and he is further authorized to prepare the necessary blanks, books, stationery, and postage; but alleges that the amount to be expended for such purposes is limited and fixed by the terms of the act."

(11) The relator also asserts that "the act deprives citizens of the state of the constitutional right of due process of law in requiring the appointment of an attorney in fact upon whom service of judicial process may be made." This objection is predicated upon § 9 of the act, which reads as follows: "The officer to be bonded shall, prior to the execution of such bond, execute and file in the office of the commissioner of insurance, an instrument appointing the commissioner of insurance, and his successors, his true and lawful attorney upon whom all

process in any action or proceeding against such officer may be served, and therein shall agree that any process which may be served upon his said attorney shall be of the same force and validity as if served on him personally, and that the authority thereof shall continue in force, irrevocably so long as any liability of such official or of such state bonding fund remains. In actions upon such bond when the sheriff files his return that he is unable, after diligent search, to find such bonded officer for the purpose of serving the summons, service upon the commissioner of insurance shall be deemed and held to be personal service upon such bonded official. Whenever process against any such bonded official shall be served upon the commissioner of insurance, he shall forthwith mail a copy of such process, postage prepaid, directed to such bonded official at the residence of such official stated in such instrument. The commissioner shall keep a record of all such process which shall show the time and hour of service."

The relator says that this section "takes away from every citizen who happens to be an office holder and whose official acts have been questioned either rightfully or wrongfully, the right of . . . having process served personally upon him, one of the most valuable rights which are accorded to the citizen by the Constitution."

Relator's counsel assumes that the provision under consideration dispenses with personal service upon the principal (the officer bonded), in all actions upon claims arising under the state bonding fund act. The act is not susceptible of this construction. It clearly contemplates personal service upon the officer bonded the same as in all other actions, where such service may be had. The provision for service upon the commissioner of insurance as attorney becomes applicable only "in actions upon such bond when the sheriff files his return that he is unable, after diligent search, to find such bonded officer for the purpose of serving the summons."

Obviously the only persons whose rights are affected or whose property may be taken are the municipal officers who hereafter may procure official bonds under the provisions of the state bonding fund act. And the rights of such officers could be affected only in a case wherein it was sought to obtain and enforce against them or their property a personal judgment based upon service of process made upon the commissioner of insurance as attorney. Whether an officer could in any event success-

fully maintain the objection sought to be raised by the relator we are not called upon to determine. The relator is not an officer, and his rights are not, nor are the rights of the state, or any of its municipalities or citizens, generally affected. The rights of claimants to maintain actions and establish their claims against the state bonding fund are not affected, nor are the rights of the commissioner of insurance to defend such actions lessened or impaired. It is a firmly settled principle of law that a court will not listen "to an objection made to the constitutionality of an act by a party whose rights it does not affect, and who has therefore no interest in defeating it." Cooley, Const. Lim. 7th ed. 232.

Cyc. (8 Cyc. 788) states the rule thus: "All constitutional inhibition against the taking of private property without due process of law, and all constitutional guaranties of equal rights and privileges, are for the benefit of those persons only whose rights are affected, and cannot be taken advantage of by any other persons."

"A person who is seeking to raise the question as to the validity of a discriminatory statute has no standing for that purpose unless he belongs to the class which is prejudiced by the statute." (6 R. C. L. § 89.) And "where the class which includes the party complaining is in no wise prejudiced the general rule is that it is immaterial whether a law discriminates against other classes, or denies to other persons equal protection of the laws." (6 R. C. L. § 88.) But "a member of a particular class which may be discriminated against does not necessarily have the right to champion any grievance of that entire class in the absence of any actual interest which is prejudiced or impaired by the statute in question." (6 R. C. L. § 90.) This principle has repeatedly been announced by this court. *State v. McNulty*, 7 N. D. 169, 73 N. W. 87; *State ex rel. McClory v. Donovan*, 10 N. D. 203, 86 N. W. 709; *Turnquist v. Cass County Drain Comrs.* 11 N. D. 514, 92 N. W. 852; *Ely v. Rosholt*, 11 N. D. 559, 93 N. W. 864; *State v. Stevens*, 19 N. D. 249, 123 N. W. 888.

In *State v. McNulty*, 7 N. D. 169, 73 N. W. 87, a search warrant had been issued under the provisions of the state prohibition law for the seizure of all property in a certain building. Part of the building was occupied as a hotel, and the defendant claimed that the warrant and the statute under which it was issued were invalid for the reason

that the property of guests in the hotel might be taken without due process of law. In disposing of this contention this court said: "In law, it can make no . . . difference to him whether the property of third persons is seized or not. It is a well-established and wholesome rule of law that no one can take advantage of the unconstitutionality of any provision who has no interest in and is not affected by it." No court has applied this principle with greater force than the Federal Supreme Court. See *Clark v. Kansas City*, 176 U. S. 114, 44 L. ed. 393, 20 Sup. Ct. Rep. 284; *Aluminum Co. v. Ramsey*, 222 U. S. 251, 56 L. ed. 185, 32 Sup. Ct. Rep. 76, 1 N. C. C. A. 251; *Collins v. Texas*, 223 U. S. 288, 56 L. ed. 439, 32 Sup. Ct. Rep. 286; *Standard Stock Food Co. v. Wright*, 225 U. S. 540, 56 L. ed. 1197, 32 Sup. Ct. Rep. 784; *Jeffrey Mfg. Co. v. Blagg*, 235 U. S. 571, 59 L. ed. 364, 35 Sup. Ct. Rep. 167, 7 N. C. C. A. 570; *Tyler v. Registration Ct. Judges*, 179 U. S. 405, 45 L. ed. 252, 21 Sup. Ct. Rep. 206; See also *State v. Kirby*, 34 S. D. 281, 148 N. W. 533; *Jensen v. Southern P. Co.* 215 N. Y. 514, L.R.A.1916A, 403, 109 N. E. 600; *Cram v. Chicago, B. & Q. R. Co.* 85 Neb. 586, 26 L.R.A.(N.S.) 1028, 123 N. W. 1045, 19 Ann. Cas. 170, and valuable note commencing at page 175 in latter report.

(12) No person is required to obtain an official bond from the state bonding fund. A bond executed by personal sureties or by a surety company may still be furnished as before. The act exacts the same requirement from all officers accepting the benefits thereof. Whether any person who accepts the benefits of the state bonding fund act can subsequently be heard to say that any of its provisions are invalid, we do not determine, because that question is not properly before us in this action. Obviously this court should not decide questions abstractly, or speculate upon the proper decision of issues which may never arise. The extent of inquiry in an original proceeding in the supreme court was recently considered by the supreme court of Wisconsin in *State ex rel. Bolens v. Frear*, 148 Wis. 456, L.R.A.1915B, 569, 134 N. W. 673, 135 N. W. 164, Ann. Cas. 1913A, 1147. That was an original proceeding assailing the constitutionality of the state income tax law. The court held that "in such an action only those questions will be determined which may be considered as relating to the validity of the whole act, leaving for future consideration, as concrete cases

may arise, the questions relating to the validity of minor provisions as to matters of detail." The court declined to decide in that action whether national banks or public officers could be constitutionally subjected to the payment of such tax. See also *State ex rel. Arpin v. Eberhardt*, 158 Wis. 20, 147 N. W. 1016; *Hunter v. Colfax Consol. Coal Co.* — Iowa, —, L.R.A.—, —, 154 N. W. 1037; *State ex rel. Martin v. Howard*, 96 Neb. 278, 147 N. W. 689, 695; *State ex rel. Lenhart v. Hanna*, 28 N. D. 583, 149 N. W. 573; *Phoenix R. Co. v. Geary*, 239 U. S. 277, 60 L. ed. 287, 36 Sup. Ct. Rep. 45; *Minsinger v. Rau*, 236 Pa. 327, 84 Atl. 902, Ann. Cas. 1913E, 1324; *Flint v. Stone Tracy Co.* 220 U. S. 107, 55 L. ed. 389, 31 Sup. Ct. Rep. 342, Ann. Cas. 1912B, 1312.

(13) It is next asserted that the act contains wrongful and unlawful discriminations and arbitrary classifications, and therefore contravenes § 11 of the state Constitution, which reads: "All laws of a general nature shall have a uniform operation." This objection is directed at the following provisions of the act:

"Section 2 . . . No such bonds shall be issued . . . for the bonding of any official for a greater amount than \$50,000; and any official required by law to be bonded in any greater amount than \$50,000, shall be bonded in the sum in excess of \$50,000 with a duly authorized surety company or by personal sureties. The premiums on such excess bonds, except in the case of personal sureties, shall be paid out of the county, village, city, town, school district, or township treasury as the case may be."

Section 3: "The premium of such bonds shall be 25 cents per hundred dollars per year on all bonds issued. Such premium shall be paid in advance by the proper authorities of each county, city, town, village, school district or township, from its respective treasury to the state treasurer, who shall issue receipts therefor as hereinafter provided. The minimum on small bonds and short term officers' bonds shall not be less than \$2.50."

The specific objection is: (1) That the duties, obligations, dangers, and risks of the various officers to be bonded are of such different degrees that different premiums should be charged: and (2) that any county whose treasurer is required to furnish bonds in excess of \$50,000 will be

compelled to pay an excessive rate for the bond required in excess of \$50,000.

The Constitution neither requires municipal officers to furnish official bonds, nor does it exempt them from so doing. In absence of such constitutional provisions, it is generally held that the legislature has the right to require such officers to furnish bonds. 29 Cyc. 1375 et seq. See also Dill. Mun. Corp. 5th ed. §§ 97-103, 394-396, 433. In such case the legislature (within the limits of its constitutional authority) may also determine what officers shall furnish such bonds, and the amounts and conditions thereof. The legislature of this state has designated the officers required to furnish bonds, and prescribed the conditions and amounts thereof. Comp. Laws 1913, §§ 660, 663, et seq.) In 1899 the legislature enacted a law providing that every county treasurer must furnish a surety bond, and that the amount of the premium therefor shall be audited and paid out of the general fund of the county. (Comp. Laws 1913, § 664.) And in 1903 the legislature enacted another law providing that whenever any county, township, city, village, or school-district officer thereafter elected shall be required by law to give or furnish a bond for the faithful performance of his duties, such bond may be executed by some responsible surety company authorized to do business in the state; and that the premium for such bond shall be audited and paid out of the general fund of the county, township, city, or school district, as the case may be, for whose benefit the same is given. (Comp. Laws 1913, § 669.) These statutory provisions have remained in force ever since they became effective.

The amount of official bonds to be furnished by the various county officers as fixed by the legislature in no instance exceeds \$50,000 in amount, nor can any county officer be required to furnish a bond exceeding this amount, except the sheriff, coroner, and county treasurer, which officers are required to furnish bonds in a penal sum to be fixed by the board of county commissioners. Each of these officers, therefore, may be required, upon direction by the county commissioners, but not otherwise, to furnish a bond in excess of this amount. As already stated, the requirement that municipal officers furnish official bonds depends solely upon legislative enactment. The legislature could have provided that no municipal officer should be required to furnish a bond in an

amount exceeding \$50,000; or it could have dispensed with such bonds altogether.

The constitutional provision invoked by the relator was first construed by this court in *Vermont Loan & T. Co. v. Whithed*, 2 N. D. 82, 49 N. W. 318. In that case this court, speaking through Mr. Justice Bartholomew, said: "The uniform operation required by this provision does not mean universal operation. A general law may be constitutional, and yet operate in fact only upon a very limited number of persons or things, or within a limited territory. But, so far as it is operative, its burdens and benefits must bear alike upon all persons and things upon which it does operate, and the statute must contain no provision that would exclude or impede this uniform operation upon all citizens, or all subjects and places, within the state, provided they were brought within the relations and circumstances specified in the act."

It was again construed in *Picton v. Cass County*, 13 N. D. 242, 100 N. W. 711, 3 Ann. Cas. 345, wherein an act which provided for the enforcement, by judicial proceedings, of taxes upon real property sold to the state or county, and remaining unredeemed for more than three years, and gave to the several boards of county commissioners of all counties in the state a discretionary authority to institute such judicial proceedings, was assailed as violative thereof. In that case this court, speaking through Chief Justice Young, quoted with approval the language used by Mr. Justice Bartholomew in *Vermont Loan & T. Co. v. Whithed*, quoted above, and further said: "It has already been noted that the act under consideration contains no provision restricting its operation. On the contrary, it is in force and available in every county in the state. It is probable that all counties will not avail themselves of the remedy provided by this act at the same time. Some may proceed in one year, others later, and some possibly not at all. The rights of the county and the state, as well as the tax debtor, in reference to these forfeited lands, in counties where the remedy is invoked, will be different from those which exist in counties where it is not resorted to. This, however, is merely a difference arising from the application of different remedies. The consequences are the same in each county in which the remedy is applied, and, as we have seen, it is applicable to every county in the state. That satisfies the requirement of the Constitution that laws of a general nature shall be of uniform operation. This

provision does not require uniformity in the execution of laws. If it did, practical legislation would be quite impossible. . . . The same contention was urged in *Leavenworth County v. Miller*, 7 Kan. 479, 12 Am. Rep. 425. In denying it, and holding that an act authorizing counties to subscribe for stock, and to issue bonds to aid in the construction of railroads, did not violate this provision, the court said: 'The act under consideration is so obviously in harmony with this section that the question attempted to be raised upon its supposed incongruity needs no elucidation from us. All the provisions of said act are expressly enacted for the whole state and for every part of the state; and it is no more necessary that the same amount of stock be taken in each and every county in the state, in order that the act shall have a uniform operation therein, than that the same number of men shall be executed in each county of the state, in order that the law punishing murder in the first degree shall have a uniform operation throughout the state.'” See also *Minneapolis & N. Elevator Co. v. Traill County*, 9 N. D. 213, 50 L.R.A. 266, 82 N. W. 727; *State ex rel. Hagen v. Anderson*, 22 N. D. 65, 132 N. W. 433.

These decisions are in harmony with the holdings of the Federal Supreme Court on analogous questions. *Atkin v. Kansas*, 191 U. S. 207, 48 L. ed. 148, 24 Sup. Ct. Rep. 124; *Jeffrey Mfg. Co. v. Blagg*, 235 U. S. 571, 59 L. ed. 364, 35 Sup. Ct. Rep. 167, 7 N. C. C. A. 570; *German Alliance Ins. Co. v. Lewis*, 233 U. S. 389, 58 L. ed. 1011, L.R.A.1915C, 1189, 34 Sup. Ct. Rep. 612; *Miller v. Wilson*, 236 U. S. 373, 59 L. ed. 628, L.R.A. 1915F, 829, 35 Sup. Ct. Rep. 342; *Bosley v. McLaughlin*, 236 U. S. 385, 59 L. ed. 632, 35 Sup. Ct. Rep. 345; *Heim v. McCall*, 239 U. S. 175, 60 L. ed. 206, 36 Sup. Ct. Rep. 78; *Hadacheck v. Sebastian*, 239 U. S. 394, 60 L. ed. 348, 36 Sup. Ct. Rep. 143; *Miller v. Strahl*, 239 U. S. 426, 60 L. ed. 364, 36 Sup. Ct. Rep. 147.

In *Atkin v. Kansas*, 191 U. S. 207, 48 L. ed. 148, 24 Sup. Ct. Rep. 124, the court held: “The equal protection of the laws is not denied to a contractor for a public work or his employees by the provisions of Kan. Gen. Stat. 1901, §§ 3827–3829, making it a criminal offense for such contractor to permit or require an employee to perform labor upon the work in excess of eight hours each day.” In discussing this point in that case the court said: “Equally without any foundation upon which

to rest is the proposition that the Kansas statute denied to the defendant or to his employee the equal protection of the laws. The rule of conduct prescribed by it applies alike to all who contract to do work on behalf either of the state or of its municipal subdivisions, and alike to all employed to perform labor on such work."

In *Jeffrey Mfg. Co. v. Blagg*, 235 U. S. 571, 59 L. ed. 364, 35 Sup. Ct. Rep. 167, 7 N. C. C. A. 570, it was held that employers having five or more employees are not denied the equal protection of the laws because their failure to comply with the terms of the Ohio workman's compensation act by paying into a state insurance fund thereby created the premiums required by that act deprives them in negligence suits of the defenses of contributory negligence, assumed risk, and the negligence of fellow servants, while those employing four or less employees are still privileged to make either or all of these defenses.

In *German Alliance Ins. Co. v. Lewis*, 233 U. S. 389, 58 L. ed. 1011, L.R.A.1915C, 1189, 34 Sup. Ct. Rep. 612, the court held that an act of the Kansas legislature regulating the rates of fire insurance companies was not rendered invalid as to other insurance companies, as denying the equal protection of the laws, by a provision in such act whereby farmers' mutual insurance companies organized and doing business under the laws of the state, and insuring only farm property, were exempted from such regulation.

The state bonding fund act does not discriminate in favor of, or against, any particular municipality or municipalities. Nor does it discriminate against any officer or officers belonging to the same class. It applies equally and uniformly to all municipalities and persons similarly situated. The duties to be performed by the incumbent of a particular office are of the same character in every county in the state. The danger and risk of loss incident to any particular office are presumptively the same in the different counties. If the premiums charged for the official bonds of certain officers are too low, every official of that class, and every county in the state, is similarly affected. If the premium for the official bonds of other officers is too high, every official of that class, and every county in the state, is similarly affected thereby. All are treated alike. The same holds true with respect to other municipalities. This is also true with regard to the limitations placed upon the amount for which any official may be bonded. This limi-

tation applies to all officers and all municipalities. Any municipal officer may be bonded to the amount of \$50,000. None can be bonded for a greater amount. So far as the excess is concerned the former law remains.

The limitation in amount of any one risk to be assumed by the state bonding fund is merely a recognition of the same principle found in the laws of this state, limiting the amount of any one risk which an insurance company may assume, and the amount which any banking corporation may loan to any one person or concern. This is generally recognized as a proper and valid exercise of legislative power, as well as sound, wise legislative policy. If it is within the province of legislative power and policy to impose such restrictions upon private corporations engaged in this class of business, there seems to be no good reason why it should be beyond such power to impose restrictions of a similar nature upon the same business when it is carried on under the direction of the state itself.

(14) It is also asserted that the act violates § 186 of the Constitution, which provides that "no money shall be paid out of the state treasury except upon an appropriation by law, and on warrant drawn by the proper officers. . . ." Relator claims "that the moneys collected as premiums and deposited in the state treasury, become a part of the funds in the custody of the state treasurer, and, although in the form of a special fund, they are unquestionably funds in the state treasury, and such funds cannot constitutionally be drawn except in the specific manner pointed out by the Constitution." The same contention was made with respect to the state hail insurance fund. And in the case of *State ex rel. Olson v. Jorgenson*, 29 N. D. 173, 150 N. W. 565, this court held that the moneys in the state hail insurance fund did not constitute moneys in the state treasury within the provisions of § 186 of the Constitution. In considering this point the court said: "The fund known as the hail insurance fund is composed of moneys which do not belong to the state, and which are not state funds. That fund is not used in carrying on any function of government. It is not raised by taxation, by the payment of fees, is not received from the sale of lands, or for interest on land contracts, or in any other manner which constitutes it a state or public fund, and is not the property of the state. It is derived from premiums paid by

owners of crops within the state, which premiums are held by the state treasurer and disbursed, after paying expenses provided for by the act in question, to pay losses from hail, incurred by the persons whose crops have been insured, and no appropriation is necessary to authorize its disbursement. . . . The treasurer is the custodian of the fund, not a state fund, but a fund belonging to those who contributed it for the purpose named." See also *State ex rel. Stevenson v. Stephens*, 136 Mo. 537, 37 N. W. 506, and *State ex rel. McCue v. Lewis*, 18 N. D. 125, 134, 119 N. W. 1037.

The language and reasoning applied to the state hail insurance fund is, also, applicable to the state bonding fund. The moneys in the state bonding fund do not belong to the state, but are deposited with, and held by, the state treasurer in trust, for the benefit and protection of those who under the terms of the act may become claimants against such fund. In no event do such moneys become the funds of the state. They may be disbursed only for three purposes: (1) Operation expenses; (2) payment of losses; (3) accumulation of a surplus fund of \$100,000, and at the close of each year, a proportionate distribution among the various municipalities of any moneys in the fund in excess of such surplus fund.

(15) The next contention is that the act constitutes an unwarranted legislative interference with local and municipal affairs. No specific constitutional provision is pointed out as being violated, but the objection rests upon the doctrine, frequently asserted, and at times upheld, known as "the right of local self-government." This doctrine, however, merely recognizes the fundamental principle that "all political power is inherent in the people;" and that the people have the right to distribute the powers of government in such manner as in their judgment the public good may require. Therefore when the people in their Constitution have reserved to themselves the right to have certain local officers perform certain governmental functions, the legislature has no power to deprive the people of the right, thus reserved, either by exercising such governmental functions itself, or by delegating to other officers the right to do so. *Ex parte Corliss*, 16 N. D. 470, 114 N. W. 962. The right of local self-government is merely a recognition of express or implied constitutional restrictions upon legislative power. The right exists and extends so far, and so far only, as it is reserved by

express or implied constitutional restrictions. It is true that our Constitution recognizes a county government by local officers elected by the people of the county. Const. §§ 166-173; *Ex parte Corliss*, supra. But it is also true that the legislature is given broad powers with respect to the organization and government of all municipal corporations. Const. §§ 136, 166-173; *State ex rel. Johnson v. Clark*, 21 N. D. 517, 131 N. W. 715; *School Dist. v. King*, 20 N. D. 614, 127 N. W. 515; *Martin v. Tyler*, 4 N. D. 278, 25 L.R.A. 838, 60 N. W. 392; *Ex parte Corliss*, supra; *O'Laughlin v. Carlson*, 30 N. D. 213, 152 N. W. 675. In *Ex parte Corliss*, supra, this court held that the sheriff and state's attorney are constitutional officers, and as such invested with certain inherent functions, and that the legislature could not strip them of these functions and invest a state officer appointed by the governor with the powers expressly or impliedly conferred by the Constitution upon such local officers. But in discussing the legislative power respecting such officers the court said: "We do not deny the power of the legislature to prescribe duties for these officers, which power carries with it by implication the right to change such duties from time to time as the public welfare may demand; but we deny its power to strip such offices, even temporarily, of a portion of their inherent functions and transfer them to officers appointed by central authority." And in discussing the right of local self-government, it said: "We do not mean by this that the people of each county had delegated to them these functions unrestricted by proper legislative regulations; for, as we said before, it is competent for the legislative assembly to provide by law for removals in case of malfeasance or misfeasance in office, and to provide a method of filling such vacancies."

The relations existing between the state and its municipalities were considered by the Supreme Court of the United States in *Atkin v. Kansas*, 191 U. S. 207, 48 L. ed. 148, 24 Sup. Ct. Rep. 124. The court said: "Such corporations are the creatures, mere political subdivisions, of the state, for the purpose of exercising a part of its powers. They may exert only such powers as are expressly granted to them, or such as may be necessarily implied from those granted. What they lawfully do of a public character is done under the sanction of the state. They are, in every essential sense, only auxiliaries of the state for the purposes of local government. They may be created, or, having been

created, their powers may be restricted or enlarged or altogether withdrawn at the will of the legislature; the authority of the legislature, when restricting or withdrawing such powers, being subject only to the fundamental condition that the collective and individual rights of the people of the municipality shall not thereby be destroyed."

The people, speaking through their lawmaking body, have prescribed rules for the conduct of county, city, and other municipal government, defined the duties and prescribed the qualifications of their officers. It has been provided that certain records must be kept, and that the municipal officers permit their books and accounts to be examined at stated times by the state examiner. It has also been provided that certain municipal officers must furnish official bonds. The relator concedes that the legislature has a right to require municipal officers to furnish bonds, and that the amount, conditions, and kind of bonds to be furnished is a matter for legislative determination. As already stated, under the laws of this state since July 1, 1903, all municipal officers required to furnish bonds have been permitted to furnish surety bonds; and, when furnished, the premium therefor has been paid out of the general fund of the respective municipalities. No contention is made that this former law was invalid. In fact part of relator's argument in this case is based upon the assumption that it is valid, and that the various bonding companies and their stockholders will be deprived of valuable property rights if they are deprived of the premiums which they are now receiving, and expect hereafter to receive, for such official bonds.

The relator, however, contends that the furnishing of such bonds, and the selection of the surety company which shall become surety thereon, is purely a matter for the local authorities, and that it is an unwarranted interference with the right of local self-government to attempt to restrict the municipal authorities in the selection of such surety. We are unable to agree with relator's contention. The Constitution does not directly or by necessary implication invest the municipal authorities with the right to prescribe the qualifications of their officers. As already stated it was for the legislature to determine what municipal officers should furnish bonds, and it was also for the legislature to determine the qualifications of the surety thereto. Surety companies became competent sureties upon official bonds only when the

legislature said so. The bonding of municipal officers is not altogether a local matter. Official bonds are for the protection, not only of the respective municipalities and their people, but for the protection of all people who may be damaged by the malfeasance, nonfeasance, or defalcation of such officers.

The power of the legislature to control its municipalities in matters of public concern is generally recognized. 28 Cyc. 301, 308, 311. It has been recognized by this court, and by the highest court in the land. In *Tribune Printing & Binding Co. v. Parnes*, 7 N. D. 591, 75 N. W. 904, this court sustained the validity of, and enforced, an act requiring that "all county printing [including all legal notices published by or in behalf of the county and all supplies and printed matter necessarily used by county officials in discharging their duties] shall be done in the state and if practicable in the county ordering the same." And in *State ex rel. McCue v. Lewis*, 18 N. D. 125, 119 N. W. 1037, this court sustained the constitutionality of an act requiring each county in the state to pay \$50 semi-annually to the superintendent of the Institute for the Feeble-minded, for each indigent inmate of such institution, admitted from such county. In *Heim v. McCall*, 239 U. S. 175, 60 L. ed. 206, 36 Sup. Ct. Rep. 78, the Supreme Court of the United States affirmed the New York court of appeals, and sustained the constitutionality of a statute which provided that only citizens of the United States might be employed in the construction of public works by or for the state or any of its municipalities, and that in such employment citizens of New York must be given preference. In paragraph 2 of the syllabus in that case the Federal Supreme Court held: "The general power of a state over its municipalities extends to the regulation of the kind of laborers which may be employed in the construction of public works by or for such municipalities."

The relator has cited and relies largely upon decisions of the supreme court of Michigan. The Michigan Constitution guarantees the right of local self-government (at least so far as cities and villages are concerned), in far more comprehensive and extensive terms than does the Constitution of this state; and no court has more consistently and vigorously upheld this right than has the supreme court of Michigan. The question was last considered by that court in the case of *Wood v. Detroit* — Mich. —, L.R.A.1916C, 388, 155 N. W. 592. It was there

contended that the constitutional guaranties of the right of local self-government was violated by the workman's compensation act, which subjected municipal corporations to the provisions of the act. In discussing this question the Michigan supreme court said: "The actual basis for the carrying on by municipal corporations of private municipal business is taxation. There is not, and there cannot be, any merely local power to tax persons or property, and municipal activity may still be, and it is the command of the Constitution that it shall be, restricted, limited, by the limitation of the power to tax, to borrow money and to exploit the municipal credit. Moreover, municipal corporations are still state agencies, and as such subject to legislative direction and control, none the less so because the exercise of such control may indirectly affect a private municipal activity. The act, in its application to municipalities, involves no right of local self-government, or local control and management of corporate property. It deprives the municipality of none of its property, because, in effect, it is made lawful to raise by tax the money required to pay all injured employees some compensation. A new public purpose for which taxes may be levied is declared." See also *San Luis Obispo County v. Murphy*, 162 Cal. 588, 123 Pac. 808, Ann. Cas. 1913D, 712; *People v. Crane*, 214 N. Y. 154, L.R.A.1916D, 550, 108 N. E. 427, Ann. Cas. 1915B, 1254; *Chicago v. Sturges*, 222 U. S. 313, 56 L. ed. 215, 32 Sup. Ct. Rep. 92, Ann. Cas. 1913B, 1349; *Arnett v. State*, 168 Ind. 180, 8 L.R.A.(N.S.) 1192, 80 N. E. 153; *Borgnis v. Falk Co.* 147 Wis. 327, 37 L.R.A.(N.S.) 489, 133 N. W. 209, 3 N. C. C. A. 649; 28 Cyc. 301 et seq. We reach the conclusion that no express or implied constitutional guaranties of the right of local self-government is violated by the provisions of the state bonding fund act.

(16-17) It is next contended that the act violates the following constitutional provisions relative to taxation and the expenditure of moneys raised by taxation.

Section 175. "No tax shall be levied except in pursuance of law, and every law imposing a tax shall state distinctly the object of the same, to which only it shall be applied."

Section 176. Taxes shall be uniform upon the same class of property, and shall be levied and collected for public purposes only.

Section 179. "All property . . . shall be assessed in the county,

city, township, village or district in which it is situated, in the manner prescribed by law. . . .”

We will consider the alleged violations in their respective order.

It is contended that as the act, which (if valid) went into effect January 1, 1916, provides for the payment of premiums in advance, that this will in many instances necessitate such payment before any taxes can be levied or collected for that purpose, and that therefore moneys raised for other purposes must be diverted in order to pay such premiums. A sufficient answer to this contention is that under the laws of this state the various municipalities which may be required to pay such premiums to the state bonding fund have been required to pay such premiums on official bonds of their municipal officers when written by surety companies since 1903. (Comp. Laws 1913, §§ 664, 667, and 669.) It was therefore the duty of the municipal authorities to make proper provision for funds for this purpose, and it is presumed that such provision has been made. It is not contended that the premiums to be paid to the state bonding fund are in excess of those formerly, or now required, to be paid for such bonds to the various surety companies. On the contrary, relator's argument in support of the attack made on another provision of the law is based on the theory that the premiums charged by the state bonding fund are less than those charged by surety companies. So far as the various municipalities are concerned, they are merely required to pay the premium to the state bonding fund instead of to some surety company. The moneys are paid for the same purpose for which they were raised, *viz.*, to compensate a surety qualified by the laws of this state for the risk assumed in becoming surety on such official bond. See also 11 Cyc. 582; 28 Cyc. 310.

The relator, also, asserts that the various municipalities are required to contribute to the payment of losses occurring in other municipalities, and that moneys raised by taxation from citizens of one taxing district may be distributed for the benefit and to the uses of citizens of another taxing district. Relator says: “Every tax raised must not only be for a public purpose, but it must be for a local public purpose and expended in the district in which it was raised. Taxes are reciprocal in their nature; citizens paying taxes are entitled to a return in the expenditure of such moneys in the subdivision in which the same is paid in.”

It is true the Constitution requires that all taxable property shall be assessed in the taxing district in which it is situated (Const. § 179), and that taxes can be levied and collected only for public purposes (Const. § 176.) And citizens of this state are doubtless entitled to have their property assessed in the place designated, and only for the purposes permitted, by the Constitution. But we are aware of no constitutional requirement that taxes levied for a general public purpose must be expended and disbursed in the taxing district in which they were collected. If this were true, every department, not only of the state, but also of county, government, would soon cease to operate. The moneys paid by any municipality to the state bonding fund are expended primarily for the benefit of such municipality. The premium paid is in consideration of the obligation assumed by the state bonding fund to indemnify such municipality (and all others) against loss by reason of the breach of official duty on part of the officers bonded. For the past twelve years and over the various municipalities have been required to pay such premiums to the various surety companies who performed this service. Does the performance of this service by an agency created and operated by the state change the functions and objects of such service? Does payment of money to a state agency for a service formerly rendered by private corporations cease to be moneys expended for a public purpose? Clearly not. The service rendered to the municipality is of substantially the same character whether it is performed by a private corporation or by a state fund operated for the mutual protection of all participants. In either event the moneys paid for such premiums may be, in whole or in part, expended and distributed outside of the taxing district where raised. The municipality, however, has received what it paid for when it receives the official bond executed by the surety. It is for the protection afforded and the risk assumed thereby that the premium is paid. If anything, the performance of this service by a public agency adds to, rather than detracts from, the public character of the services thus performed. As said by the supreme court of Michigan, in *Wood v. Detroit*, — Mich. —, L.R.A.1916C, 388, 155 N. W. 592, 596: "The distinction between powers governmental in character and those private in character, as exercised by municipal corporations, does not involve the abrogation of the distinction between private municipal activity and private indi-

vidual activity. To employ a seeming paradox, private municipal activities are all of them public. What has been called private in municipal activity is, nevertheless, public when contrasted with purely private enterprise and adventure."

In *State ex rel. Goodwin v. Nelson County*, 1 N. D. 88, 8 L.R.A. 283, 26 Am. St. Rep. 609, 45 N. W. 33, this court held that an act authorizing counties to issue bonds to procure seed grain for needy farmers resident therein was a valid exercise of legislative power, and that the tax provided for in the statute was laid for a public purpose.

In the case of *Cunningham v. Northwestern Improv. Co.* 44 Mont. 180, 119 Pac. 554, 1 N. C. C. A. 720, the supreme court of Montana held that a tax levied to raise a fund to provide industrial insurance benefits to injured employees engaged in extra hazardous occupations is for a "public purpose," notwithstanding the fact that the act operated to the direct benefit of the injured employee or his dependents, and not directly to the public generally.

In *Brodhead v. Milwaukee*, 19 Wis. 658, 88 Am. Dec. 711, the supreme court of Wisconsin considered the validity of a tax imposed for the payment of bounties to volunteers who might enlist in the service of the United States during the Civil War. The court reached the conclusion that the tax was levied for a public purpose. In discussing this point it said: "The objects for which money is raised by taxation must be public and such as subserve the common interest and well-being of the community required to contribute. To justify the court in arresting the proceedings and declaring the tax void, the absence of all possible public interest in the purposes for which the funds are raised must be clear and palpable—so clear and palpable as to be perceptible by every mind at the first blush."

In *Borgnis v. Falk Co.* 147 Wis. 327, 37 L.R.A.(N.S.) 489, 133 N. W. 209, 3 N. C. C. A. 649, it was held that the provisions of the Wisconsin workmen's compensation act requiring municipal corporations to compensate all workmen injured in their employ did not require taxes to be levied for other than public purposes, or deprive tax payers of their property without due process of law.

In the case of *Noble State Bank v. Haskell*, 22 Okla. 48, 97 Pac. 590, 219 U. S. 104, 55 L. ed. 112, 32 L.R.A.(N.S.) 1062, 31 Sup. Ct. Rep. 186, Ann. Cas. 1912A, 487, the supreme court of Oklahoma and the

Supreme Court of the United States sustained the constitutionality of the Oklahoma depositors' guaranty law, which authorized the assessment and collection of a certain per cent on the daily average deposit of each and every bank organized under the laws of the state, as a fund to pay the losses caused depositors by failing and insolvent banks. The Supreme Court of the United States, in answer to the objection that the act took property for a private use and created a liability without fault, said: "The substance of the plaintiff's argument is that the assessment takes private property for private use without compensation. And while we should assume that the plaintiff would retain a reversionary interest in its contribution to the fund, so as to be entitled to a return of what remained of it if the purpose were given up (see *Danby Bank v. State Treasurer*, 39 Vt. 92, 98), still there is no denying that by this law a portion of its property might be taken without return to pay debts of a failing rival in business. Nevertheless, notwithstanding the logical form of the objection, there are more powerful considerations on the other side. In the first place, it is established by a series of cases that an ulterior public advantage may justify a comparatively insignificant taking of private property for what, in its immediate purpose, is a private use. (Citation of authorities.) And in the next, it would seem that there may be other cases beside the everyday one of taxation, in which the share of each party in the benefit of a scheme of mutual protection is sufficient compensation for the correlative burden that it is compelled to assume. See *Ohio Oil Co. v. Indiana*, 177 U. S. 190, 44 L. ed. 729, 20 Sup. Ct. Rep. 576, 20 Mor. Min. Rep. 576. At least, if we have a case within the reasonable exercise of the police power as above explained, no more need be said." See also *Hunter v. Colfax Consol. Coal Co.* — Iowa, —, L.R.A.—, —, 154 N. W. 1037, 1058; *State ex rel. Davis-Smith Co. v. Clausen*, 65 Wash. 156, 37 L.R.A.(N.S.) 466, 117 Pac. 1101, 2 N. C. C. A. 823, 3 N. C. C. A. 599; *State ex rel. Yaple v. Creamer*, 85 Ohio St. 349, 39 L.R.A.(N.S.) 694, 97 N. E. 602, 1 N. C. C. A. 30; *Cunningham v. Northwestern Improv. Co.* 44 Mont. 180, 119 Pac. 554, 1 N. C. C. A. 720; *Mathison v. Minneapolis Street R. Co.* 126 Minn. 286, L.R.A.1916D, 412, 148 N. W. 71, 5 N. C. C. A. 871; and *Wood v. Detroit*, — Mich. —, L.R.A.1916C, 388, 155 N. W. 592, 4 Words & Phrases, 2d series, 30, 31.

It is next contended that the provisions of the act relating to the creation of a fund of \$100,000 and a distribution of the excess render it repugnant to the constitutional provisions above quoted, relating to taxation. Relator says: "The accumulation of such fund is not for a public purpose, and the distribution therein provided for is the exaction of a tribute from the present citizen of the state to such citizen of the state as shall be residents of particular taxing districts at the time the same is distributed, for when distributed it will be used for the purpose of that particular district and to the benefit of the people then resident therein."

We think this argument is fully answered by the authorities cited and quoted in the preceding paragraph. The sole function of the state bonding fund is to write official bonds. "The legislature was confronted with the duty to devise a plan, complete in itself, for dealing with the subject and accomplishing the desired purpose. The limitation upon its power in this direction is the Constitution, which I think it has not contravened." (Wood v. Detroit, — Mich. —, L.R.A. 1916C, 388, 155 N. W. 592, 596.)

Obviously the operation of this fund may result in either a surplus or a deficit. This act provides for both contingencies. It is desirable that funds be available for the payment of claims as they may accrue. The moneys paid for premiums are primarily intended for the protection of claimants and the payment of claims. The distribution of any possible or probable surplus is a mere incidental matter, and certainly the legislature has power to prescribe reasonable conditions for the operation of the fund so as to render the same best able to accomplish the purpose for which it was created.

The next and last objection urged is that the act violates the fundamental law in that it engages the sovereign state in a private business in competition with the citizens of the state. The relator has not specified any particular constitutional provision violated, but contends that the service endeavored to be performed by the state bonding fund is not a function of the government, but distinctly a private business.

(18) Very early in the history of the state this court held that the legislature, in exercise of the police power, might prohibit private banking, which previously had been permitted in the territory and state, and require all banks to be organized and conducted under certain

rules and regulations prescribed by the legislature. "The legislative prerogative," said Mr. Justice Wallin, speaking for the court, in *State ex rel. Goodsill v. Woodmansee*, 1 N. D. 246, 250, 11 L.R.A. 420, 46 N. W. 970, "in the exercise of its police power in promoting the public safety, not only to regulate and restrict the business of banking, but also to grant the right to one class, and to prohibit to others, or even to forbid it altogether, has never been questioned in the courts, and the legislatures of other states have frequently exercised the right of supreme control over the business." This principle was approved by the Supreme Court of the United States in *Noble State Bank v. Haskell*, supra. In defining the police power and pointing out the wide extent of its operations, Mr. Justice Holmes, speaking for the court in *Noble State Bank v. Haskell*, supra, said: "It may be said in a general way that the police power extends to all the great public needs. *Campfield v. United States*, 167 U. S. 518, 42 L. ed. 260, 17 Sup. Ct. Rep. 864. It may be put forth in aid of what is sanctioned by usage, or held by the prevailing morality or strong and preponderant opinion to be greatly and immediately necessary to the public welfare."

In discussing the same subject in *German Alliance Ins. Co. v. Lewis*, 233 U. S. 389, 58 L. ed. 1011, L.R.A.1915C, 1189, 34 Sup. Ct. Rep. 612, the court said: "What makes for the general welfare is necessarily, in the first instance, a matter of legislative judgment, and a judicial review of such judgment is limited. 'The scope of judicial inquiry in deciding the question of *power* is not to be confused with the scope of legislative considerations in dealing with the matter of *policy*. Whether the enactment is wise or unwise, whether it is based on sound economic theory, whether it is the best means to achieve the desired result, whether, in short, the legislative discretion within its prescribed limits should be exercised in a particular manner, are matters for the judgment of the legislature, and the earnest conflict of serious opinion does not suffice to bring them within the range of judicial cognizance.' *Chicago, B. & Q. R. Co. v. McGuire*, 219 U. S. 549, 569, 55 L. ed. 328, 339, 31 Sup. Ct. Rep. 259." See also *State v. Olson*, 26 N. D. 304, L.R.A.—, —, 144 N. W. 661.

The power of the legislature to regulate the business of insurance is universally recognized. That such regulation may exist to the extent of prescribing the form of contract, limiting the amount of risk

to be assumed, and generally imposing such reasonable conditions as the legislature deems public safety and welfare to require, has never been questioned in this state. That the business of insurance is so far impressed with public interest as to justify legislative regulation of its rates has been decided not only by various state supreme courts, but by the Supreme Court of the United States. *State ex rel. Martin v. Howard*, 96 Neb. 278, 147 N. W. 689; *People v. Hartford L. Ins. Co.* 252 Ill. 398, 37 L.R.A.(N.S.) 778, 96 N. E. 1049; *German Alliance Ins. Co. v. Barnes*, 189 Fed. 769; *German Alliance Ins. Co. v. Lewis*, 233 U. S. 389, 58 L. ed. 1011, L.R.A.1915C, 1189, 34 Sup. Ct. Rep. 612.

In discussing the business of insurance, and the extent to which it has become affected with a public interest, the Supreme Court of the United States, in *German Alliance Ins. Co. v. Lewis*, supra, said: "Indeed, it is a matter of common knowledge that rates are fixed and accommodated to those standards and classification in prearranged schedules, and, granted the rates may be varied in particular instances, they are sufficiently definite and applicable as a general and practically constant rule. They are the product, it is true, of skill and experience, but such skill and experience a regulating body may have as well as the creating body. . . . It would indeed be a strained contention that the government could not avail itself, in the exercise of power it might deem wise to exert, of the skill and knowledge possessed by the world."

The court further said: "The restrictions upon the legislative power which complainant urges we have discussed, or rather the considerations which take, it is contended, the business of insurance outside of the sphere of the power. To the contention that the business is private we have opposed the conception of the public interest. . . . How can it be said that the right to engage in the business is a natural one when it can be denied to individuals and permitted to corporations? How can it be said to have the privilege of a private business when its dividends are restricted, its investments controlled, the form and extent of its contracts prescribed, discriminations in its rates denied, and a limitation on its risks imposed? Are not such regulations restraints upon the exercise of the personal right—asserted to be fundamental—

of dealing with property freely, or engaging in what contracts one may choose, and with whom and upon what terms one may choose?

We may venture to observe that the price of insurance is not fixed over the counters of the companies by what Adam Smith calls the higgling of the market, but formed in the councils of the underwriters, promulgated in schedules of practically controlling constancy which the applicant for insurance is powerless to oppose, and which, therefore, has led to the assertion that the business of insurance is of monopolistic character, and that 'it is illusory to speak of a liberty of contract.' "

The state's authority to create funds for the benefit of certain classes, and impose upon those properly chargeable therewith the burden of making payments to such funds, has frequently been recognized. Statutes imposing a liability upon fire insurance agents, based upon the amount of the insurance effected by them, for the benefit of a fund to care for and cure sick and injured firemen, have been upheld in the states of New York and Illinois. *Fire Dept. v. Noble*, 3 E. D. Smith, 440; *Fire Dept. v. Wright*, 3 E. D. Smith, 453; *Exempt Firemen's Benev. Fund v. Roome*, 29 Hun, 391, 394; *Firemen's Benev. Asso. v. Lounsbury*, 21 Ill. 511, 74 Am. Dec. 115. And an act establishing and maintaining a pension fund for city employees was upheld in Illinois. *Hughes v. Traeger*, 264 Ill. 612, 106 N. E. 431. So, also, do the various workmen's compensation acts provide for an insurance fund. And, as already stated, the Oklahoma depositors' guaranty law provided for a fund for the protection of depositors.

No person is required to become a depositor in any particular bank, but all persons are required to transact official business with the particular officers designated for that purpose. Obviously if a state may operate a fund for the benefit and protection of depositors in banks, it may, with far more reason and propriety, operate a fund for the protection of those who may be injured by reason of the wrongful act, neglect of duty, or defalcation of some public officer.

It is not necessary for us to determine whether the state can engage in a private trade or business. That question is not presented in this case. The state bonding fund is not intended to transact private business. It may not bond any private individual or secure the performance of any private duty. Its bonds may be issued only to public officers to secure the public, the state, and its municipalities against loss by

reason of the nonfeasance, misfeasance, or defalcation of such officers. Whether any necessity exists for requiring such protection, the extent thereof, and the proper method of affording the same, are concededly proper matters for legislative determination. Because, as we have already indicated, the legislature has sole and exclusive control over the matter of official bonds to be given by municipal officers. It can fix the amount and prescribe the conditions of such bonds, as well as determine by what surety the same shall be executed and the qualifications of such surety; or the legislature may entirely dispense with the requirement that such bonds be furnished. The right of surety companies to become surety on such bonds rests solely upon the legislative authority permitting them to do so. The legislature in the first instance decided that certain public officers must furnish bonds. At that time it prescribed the qualifications of the personal sureties and the number required. Subsequently the legislature determined that public welfare and safety demanded that county treasurers be required to furnish surety bonds. Later it determined that all county and municipal officers, required to furnish bonds, might furnish surety bonds at the expense of the respective municipalities. By the enactment of the state bonding fund act, the legislature has said that public welfare and safety requires the creation and operation of such fund for the purpose of furnishing this method of indemnity against loss which may occur by the nonfeasance, misfeasance, or defalcation of public officials. The state credit is not affected in any manner. The moneys in the fund do not constitute state funds, nor will any indebtedness against the fund constitute an indebtedness of the state. It is merely a fund which the state has authorized to be established and operated for the mutual benefit and protection of the various municipalities and the people of the state in general. The entire subject-matter of the legislation relates to matters peculiarly within legislative control, and impressed in an unusual degree with public interest. In enacting the state bonding fund act, the legislature exercised its police power,—“the power inherent in every sovereignty . . . the power to govern men and things,”—under which power, the legislature may, within constitutional limitations, not only prohibit all things hurtful to the comfort, safety, and welfare of society, but prescribe regulations to promote the public health, morals, and safety, and add

to the general public convenience, prosperity, and welfare. See 6 R. C. L. §§ 182 et seq.; 3 Words & Phrases, 2d Series, 1064 et seq., and authorities there cited.

The relator, also, assails the wisdom and policy of the legislation. As we have already stated this was a matter for legislative consideration. And, to quote the language of the highest court in the land, "if it be said that a statute like the one before us is mischievous in its tendencies, the answer is that the responsibility therefor rests upon legislators, not upon courts. No evils arising from such legislation could be more far reaching than those that might come to our system of government if the judiciary, abandoning the sphere assigned to it by the fundamental law, should enter the domain of legislation, and, upon grounds merely of justice or reason or wisdom, annul statutes that had received the sanction of the people's representatives. We are reminded by counsel that it is the solemn duty of the courts in cases before them to guard the constitutional rights of the citizen against merely arbitrary power. That is unquestionably true. But it is equally true—indeed, the public interests imperatively demand—that legislative enactments should be recognized and enforced by the courts as embodying the will of the people, unless they are plainly and palpably, beyond all question, in violation of the fundamental law of the Constitution." *Atkin v. Kansas*, 191 U. S. 207, 48 L. ed. 148, 24 Sup. Ct. Rep. 124.

Our conclusion is that the act in question is not vulnerable to any of the attacks made against it in this proceeding. The writ prayed for is denied.

All concur.

WILLIAM E. BARKLEY v. MAURICE QUICK and Arthur Quick.

(156 N. W. 544.)

Suit for supervising and aiding in the sale of a building and for premiums advanced by plaintiff upon insurance policies.

Insurance — premiums — evidence — case — jury — sufficient to warrant submission to — sale.

1. Evidence examined and held sufficient to require the submission to the jury of the first cause of action, to wit, the \$500 services claimed by plaintiff

to have been performed in looking after the building and aiding in effecting a sale.

Case — evidence — submission to jury — premiums — insurance policies.

2. Evidence examined and held sufficient to require the submission to the jury of the second cause of action, to wit, the premiums advanced upon the insurance policies.

Evidence — conversation — between defendant and another — absence of plaintiff — exclusion.

3. There was no error in excluding a conversation between defendant and one F. at which plaintiff was not present.

Instructions of court — jury — proper.

4. Certain instructions of the court set out in the opinion are without error.

Opinion filed February 9, 1916.

Appeal from the District Court of Pembina County, *Kneeshaw, J.*
Affirmed.

W. J. Mayer (*F. H. Stubbs* of counsel), for appellants.

A third person who is under no obligation to pay the debt of another cannot without his request, officiously pay that other's debt and recover the amount from the debtor, where the debtor does not ratify such payment. Such a payment is wholly voluntary. 22 Am. & Eng. Enc. Law, 537.

Assent necessarily implies a meeting of minds of all contracting parties,—a coming together upon the common ground of a mutual understanding of facts and of the subject-matter. 7 Am. & Eng. Enc. Law, 113.

There is a total want of mutuality of consideration. Bishop, Contr. § 78.

The trial court in charging the jury can only instruct as to the law. Rev. Codes 1905, § 7021, Comp. Laws 1913, § 7620.

An instruction which assumes the existence of material facts in issue invades the province of the jury and is erroneous, if there be *any* evidence in conflict with such assumption. 11 Enc. Pl. & Pr. 116, 128, 131.

Where the only evidence sufficient upon an essential point is the testimony of a party in his own favor, or of that of a witness interested

in his favor, it is error not to submit the case to the jury. Abbott, Civil Jury Cases, 3d ed. p. 611.

It is error to assume the existence of a fact in an instruction, though other instructions submitted the question whether or not such fact existed. 11 Enc. Pl. & Pr. 116, 121; Bressler v. Schwertferger, 15 Ill. App. 294.

The contract of insurance is a personal contract. 16 Am. & Eng. Enc. Law, 843.

Contracts of fire insurance are not assignable, unless the insurer consents thereto. 13 Am. & Eng. Enc. Law, 185, and cases cited.

The assignment of an insurance policy is effective only when accepted by the insurer. This is a new contract, and for that reason is only binding when accepted. 1 Jones, Mortg. § 396; Wilson v. Hill, 3 Met. 69; Macomber v. Cambridge Mut. F. Ins. Co. 8 Cush. 133.

Where there is no insurable interest the insured is released from the payment of the premiums. 13 Am. & Eng. Enc. Law, 131.

And the consideration may be recovered back. 13 Am. & Eng. Enc. Law, 101.

Gray, Myers, & Spiller (*Berge & McCarty* of counsel), for respondent.

Objection to evidence on the ground of variance nowhere appears in the record. In this jurisdiction, no variance is material, "unless it has actually misled the adverse party to his prejudice," and this fact, and the manner in which his cause has been prejudiced, must be shown to the satisfaction of the court, to avail the party. Comp. Laws 1913, § 7478; Maloney v. Geiser Mfg. Co. 17 N. D. 195, 115 N. W. 669; Halloran v. Holmes, 13 N. D. 411, 101 N. W. 310.

It is the rule that if advantage be not taken of a variance at the trial, it will be treated in the appellate court as having been waived. 13 Enc. Ev. 740, ¶ 1; 22 Enc. Pl. & Pr. 640, ¶ 6; 31 Cyc. 756.

The only exception to this rule is where, upon inspection, the variance appears of such a character as that the judgment would not serve to protect the defeated party as to the matter litigated. 13 Enc. Ev. 741, ¶ 3; 22 Enc. Pl. & Pr. 630; 31 Cyc. 756.

Where the insured transfers his interest in the subject-matter insured, and, with the consent of the company, assigns the policy, a new and

independent contract has arisen by which the assignee acquires all the rights of the assignor. 19 Cyc. 635 (3).

When an insurance policy is thus assigned, the company is deemed to have waived all defenses available against the assignor at such time, not inhering in the estate or interest of the assignee, and also all breaches of conditions, past or present, of which it then knew. 19 Cyc. 795; *Hall v. Niagara F. Ins. Co.* 93 Mich. 184, 18 L.R.A. 135, 32 Am. St. Rep. 497, 53 N. W. 727; *Ellis v. Insurance Co. of N. A.* 32 Fed. 646.

When policies of insurance are canceled, the insured or his assignee is entitled to a return of the unearned premiums. *Phoenix Assur. Co. v. Munger Improved Cotton Mach. Mfg. Co.* 92 Tex. 297, 49 S. W. 222.

While courts, under the circumstances here existing, are quite unanimous in according some remedy, they are not in harmony in their course of reasoning as to that result. Some proceed on the theory of ratification, some on the theory of adoption, and others on the theory of estoppel. 27 Cyc. 837(g); *Poe v. Dorrah*, 20 Ala. 288, 56 Am. Dec. 196; *Roundtree v. Holloway*, 13 Ala. 357; *Ross v. Pearson*, 21 Ala. 473; *Oliver v. Camp*, 9 Ala. App. 232, 62 So. 469; *Pracht v. Daniels*, 20 Colo. 100, 36 Pac. 845; *Goodnow v. Wells*, 76 Iowa, 774, 38 N. W. 172; *Goodnow v. Stryker*, 61 Iowa, 261, 16 N. W. 486; *Holbrook v. Clapp*, 165 Mass. 563, 43 N. E. 508; *Greenland v. Weeks*, 49 N. H. 472; *Nutter v. Sydenstricker*, 11 W. Va. 535; *Lee v. Virginia & M. Bridge Co.* 18 W. Va. 299; *Barnett v. Watson*, 1 Wash. (Va.) 372.

A contract is only a meeting of the minds of the parties as to certain reciprocal obligations. Contracts are construed under certain well-defined rules, some of which are declared by our statutes. Comp. Laws 1913, §§ 5896, 5903, 5907, 5909, 5915.

"Although, on its face and by its express terms, the contract is obligatory on one party only, yet if the intention of the parties and the consideration upon which the obligation is assumed is that there shall be correlative obligations on the other side, the law will imply it." 9 Cyc. 333 (III).

And, in case of lack of mutuality at its inception, such defect was cured by the subsequent sale of the property by the promisor, after full performance by the promisee. 9 Cyc. 333 (V).

If in the progress of the trial evidence is introduced by either party

at variance with the issues as shown by the pleadings, without proper objection, the error is waived and the court may properly instruct in relation to the whole case as covered by the evidence having reference to the issues actually litigated by the parties, regardless of the pleadings, but in accord with the *theory* upon which the cause was tried. 11 Enc. Pl. & Pr. 167; 38 Cyc. 1616, and cases cited in notes 25-27; Georgia Southern & F. R. Co. v. Perry, 8 Ga. App. 427, 69 S. E. 493; Totten v. Stevenson, 29 S. D. 71, 135 N. W. 715; Johnson v. Caughren, 55 Wash. 125, 104 Pac. 170, 19 Ann. Cas. 1148; Missouri River Transp. Co. v. Minneapolis & St. L. R. Co. — S. D. —, 147 N. W. 82; McKee v. Garner, — Tex. Civ. App. —, 168 S. W. 1031.

Where the evidence in support of a given fact is conclusive, and not controverted by other evidence, the judge in his instructions may assume such fact as proved. 11 Enc. Pl. & Pr. 132 (g); 38 Cyc. 1667, and voluminous notes.

BURKE, J. In March, 1910, the defendants became the owners of a brick dormitory located near the University at Lincoln, Nebraska. At that time the building was insured against fire to the amount of about \$39,000; against tornado in the sum of \$37,000; and there was a small plate-glass insurance. The fire insurance was carried in eight different policies ranging from \$1,250 to \$12,000; and the tornado insurance in five policies ranging from \$2,000 to \$12,500. The policies were written by various companies and expired at different dates. The prior owner had purchased all of said insurance from a local company known as the Safe Deposit Insurance Agency, the president and principal owner of which was the plaintiff, Barkley. Barkley had also rendered other service to the prior owner, such as looking after repairs, rentals, bills, etc. Naturally, defendants and plaintiff were brought together, and, as defendants were nonresidents, an attempt was made to secure the services of plaintiff to look after the property. There is conflict as to the conversation between plaintiff and the defendant Maurice Quick, the father. It is conceded that Quick told Barkley to renew the insurance policies as they expired, and this was done. Plaintiff testifies that Quick asked him to look after the property in the same manner that he had been doing, but this he refused to do, but did agree to give the property a general supervision; that is, give advice

to the matron, engineer, and janitors, and to show about any prospective purchasers whom defendant might refer to him, or any who might inquire about the property. For this service he was to receive the sum of \$500 in case the building was sold. He further testifies that defendant bought of his company the insurance and agreed to pay therefor. Defendant, on the other hand, testified that there was no agreement to pay plaintiff the sum of \$500 or any other sum for the care of the building or aiding in the sale thereof, and that, as far as the insurance policies are concerned, it was understood that he, Quick, was to be liable only for the amount of insurance premiums up to the time of the sale of the property, and that thereafter the new purchaser should assume the liability, or that the policies should be canceled. Passing this dispute for a minute and proceeding to the facts before us, it is admitted that about November, 1910, the defendant sold the building to one Farrington and assigned the insurance policies to said purchaser. The Farrington company in turn sold the building to one Matters and likewise assigned the insurance policies. A further dispute arises between defendants and Farrington as to whether those policies were assigned as fully paid, but that is not, of course, directly involved. Plaintiff's company attempted to collect the premiums from Matters, Farrington, and the Quicks, but was refused payment in each instance. They, thereupon, attempted to cancel the policies by writing across the face of the same the word "canceled" or its equivalent. The owner of the building, Matters, insisted that the policies were paid up and that he had purchased them as such; took up the matter with the various insurance companies, and forced them to reinstate said policies. Plaintiff brings this action as assignee of his company upon two counts,—first, for the \$500 sale commission; and, second, for the premiums due upon the insurance policies. The action was tried to a jury below, who found for plaintiff in the full sum demanded. Appellant makes four complaints of the conduct of that trial,—first, he insists that there was not sufficient evidence to go to the jury upon the first cause of action, to wit, the \$500 item; second, he insists that there was not sufficient evidence to go to the jury upon the second cause of action, to wit, the insurance premiums; third, he claims there was error in the admission of evidence; and, fourth, he claims error in the charge to the jury. We will consider each in a separate paragraph.

(1) It is, of course, elementary that upon a motion to direct a verdict in favor of either party the court will accept as true the evidence produced by the opposite party. If there is sufficient competent evidence to sustain the verdict the same will not be disturbed. It is not material that there was a conflict in the evidence. Nor are we interested in defendant's version of the contract.

With this in mind we examine the record and find that plaintiff testified as follows:

He (Quick) called me down to the hotel to talk over the subject of my looking after the property for him, and he said . . . that he wanted me to look after it and continue to look after it as I did for Mr. Hayes—and I said I could not give the attention to it that I had done for Mr. Hayes, that it had been too great a bother to me in my business. . . . He said he wanted to dispose of it, and I said in that I could be of material assistance to him. He said he might refer a number of people to me. He wanted me to see the different real estate men in Lincoln and tell them this was for sale or trade, and he gave me an idea of what he wanted me to do with it. He wanted to trade for land, especially. He wanted to get out of debt, and I said I would do what I could for him. And he said if he had any outside people that he would send them to me. . . . I said I would give it a general supervision in the way of assisting the people in charge of it.

Q. Who was in charge of it?

A. Mrs. Betts, an old school-teacher, who collected the rents and paid the bills. He asked me to take charge of that and what I would charge for that. And I said that was the part of it I wanted to get rid of as much as I could. . . . I advised the people; and having supervision of it and that I could not name the price and that I would name it later, and I did. And he said for helping to dispose of the building or selling it he would give me \$500.

Q. What did you say to it?

A. I agreed to it. It was satisfactory to me. . . .

Mrs. Betts was also a witness, and in a measure corroborated plaintiff's version of the contract. She was asked:

Q. How many times do you suppose within the period of Mr. Quick's ownership did you advise with Mr. Barkley?

A. Really, I could not say; quite often. During all the period different matters kept coming up about a large building like that, and I did not feel like using my judgment about them. And I always consulted Mr. Barkley—I was told to do so by Mr. Quick. . . .

Q. Can you not give me some idea of what the things you would have to go to Mr. Barkley about and ask his judgment?

A. Well, about the engineer and about different matters and about coal. Where I should buy it, and all sorts of things that anybody would like to have some help about. . . . Anything that was important enough. Sometimes something would give way and we would have to make repairs. The boiler would burst,—all sorts of things would happen. . . . We had to see that everything was in order, don't you know, all kinds of repairs had to be made. . . . Mr. Quick told me I should consult with Mr. Barkley whenever I needed his advice.

Q. You may state whether or not you did so consult with Mr. Barkley.

A. I did.

Q. Frequently, or otherwise?

A. Frequently. Whenever anything came up that I wanted some advice about I went to him. . . .

Q. You may state whether or not during the time that Mr. Quick owned it, Mr. Barkley ever brought a person over there to look over the building with a view of purchasing?

A. He did. . . . He did it a number of times.

Moreover, there is a letter in evidence, concededly written by the defendant to plaintiff, which contains the following language: "Have you been able to do anything along the University line of a trade?" And in another letter written by defendant to plaintiff, dated May, 1910, he asked plaintiff to obtain for him certain tax statements. We have no hesitancy in saying that this evidence, if true, and for the purpose of this motion it is so considered, is sufficient to support a verdict in favor of plaintiff upon this cause of action, and the judge was justified in submitting the matter to the jury. Appellant has much to say of the indefinite nature of the services to be performed. There is no set form for commission contracts. The owner of the property

may contract for such services as he desires. In this case plaintiff was not hired to sell the property but to assist in making a sale. Nor is the contract unenforceable because the \$500 was not to be paid until Quick sold the property. Nor is the contract unilateral. 9 Cyc. 333 (III-V).

(2) The same general observation can be made under this heading. If there is any credible evidence supporting plaintiff's theory of the case it was proper to submit the question to the jury. Again assuming the truth of plaintiff's testimony, we find all of the insurance policies upon their face purporting to be fully paid. It is conceded that defendant requested that such policies issue. The law, therefore, implies a promise to pay the premiums. True, defendant claims that he ordered them either canceled or the obligation transferred to the new purchaser, but this is flatly contradicted by plaintiff himself and by several circumstances to which reference will hereafter be made. Plaintiff testifies that his company remitted to the various insurance companies the premiums immediately after the first of each month. The corroborating circumstances to which reference has already been made relate to the assignment of the policies as paid up. When the property was sold by the Quicks to Farrington, the policies, as we have stated, were assigned to Farrington and the assignment accepted by the insurance companies. At this time all of the premiums had been paid in full to the various insurance companies. They had at that time a positive value of something like \$900.

Mr. Farrington testifies:

My recollection is that in the transfer, Farrington & Company were to get the building and the land . . . and the policies—paid-up policies—were settled for in full by us.

Q. My question was, whether or not the policies that were assigned to you and turned over to you, whether so far as the premiums due were to be paid out for the term of the policies—

A. They were to be paid up in full.

Q. In your negotiations with the Quicks did you at any time, directly or indirectly, agree to pay any premiums on any of these policies?

A. No, I did not. . . .

Q. What you paid you paid to Quick?

A. Yes, sir.

Q. Did you ever agree to pay plaintiff . . . any premiums on any of these policies?

A. Not one cent. . . .

Q. Had they told you that they were paid in full?

A. They told me—for the sum we paid, I was to get policies assigned to me in full force and effect for the term unexpired. . . .

Q. And the turning over of the policies, the actual physical act, was done by whom?

A. By the Quicks. They were delivered either by Arthur Quick or his father, Maurice Quick, and turned over to us at that time.

Q. And with the proper assignments on them?

A. Yes, sir, the assignment. . . . In the contract which we made with the Quicks we agreed as follows: "Party of the first part hereby agrees to carry \$35,000 fire insurance and \$20,000 tornado insurance . . . in favor of the holder of the above-named mortgage."

. . .

Q. He told you it was all paid up?

A. Yes, sir. Absolutely, yes.

As corroborating his version there was produced a letter written by Farrington to Quick, December 8, 1910, about twenty days after he had purchased the property, from which letter we quote: "We have a letter this morning from Mr. Barkley, of Lincoln, in which he writes us about unpaid premiums on insurance policies covering the Lincoln Building, which you sold to us, amounting to \$861.90. We are surprised to get information that this premium has not been paid, and hope that you will give this your very prompt attention."

We have not set out all of the evidence, nor have we given any of the defendants' evidence upon this phase of the question. What we have quoted is, in our opinion, sufficient to require the submission of the question to the jury. There is no merit in the suggestion of appellant that plaintiff had voluntarily paid defendant's debt. Quick's obligation was to the local agency, not to the insurance companies themselves. He had requested plaintiff to buy him insurance.

(3) The third group of assignments challenged the ruling of the court in excluding testimony by defendants of the nature of their

dealings with Farrington. The trial court excluded this conversation upon the theory that it would not bind plaintiff, who was not present and did not hear of the same. This was proper and is elementary. Later in the case the same matter was gone into thoroughly in order to bind the defendant Quick, who was present and participated in the conversation. There is no inconsistency in the court's rulings. The mere fact that the evidence was introduced as an admission by defendant against his interest does not render it admissible against the plaintiff, who was absent. The rulings of the trial court were clearly correct.

(4) The fourth group of assignments challenged the instructions to the jury. The first portion of the charge excepted to is as follows: "Now, gentlemen of the jury, the defendants in this case admit, or Maurice Quick admits, that sometime in March, 1910, he authorized the plaintiff to procure the insurance in question for him. This is undisputed." Appellant contends that the court took from the jury a disputed question of fact, and insists that throughout the trial defendants had insisted that the insurance had been procured from the insurance companies direct, though from plaintiff's company as an agent. An examination of the testimony, however, does not bear out appellant's contention. Plaintiff testifies that "he (Quick) said I should rewrite the insurance expired," and the defendant Quick testifies: "He was to write up the policies and I was to pay him." We agree with the trial court that the undisputed evidence was that plaintiff's company was to procure the insurance. There was, therefore, no error in this portion of the charge. Another paragraph of the charge to which exception is taken reads as follows: "It is undisputed in this case that the Safe Deposit Insurance Agency paid out for this insurance." Appellant insists that this is contrary to the pleadings in the case which allege that they sold insurance to the defendants. We are unable to see any error in this statement of the court. We have already quoted the testimony of plaintiff to the effect that shortly after the first of each month his company sent in to the various insurance companies all of the premiums for those policies. Another paragraph of the instructions, to which exception is taken, is as follows: "The court, therefore, instructs you as a matter of law that if you find by a fair preponderance of the evidence, that on or about March, 1910, the defendant Maurice Quick, acting on behalf of himself and his son,

Arthur A. Quick, authorized the plaintiff, Mr. Barkley, to procure the insurance in question and write such insurance, and you further find from a fair preponderance of the evidence that the plaintiff did, through the Safe Deposit Insurance Agency, write such insurance, and you further find by a fair preponderance of the evidence, that such company paid the premiums on such insurance, . . . your verdict must be for the plaintiff (upon that cause of action)." And again the court says: "The court will say that the policies in question, as shown by the evidence, were assigned by the defendants to Farrington & Company. Now, while the policies were still the property of Mr. Quick, if he had presented the same he might have had them canceled, but as against Farrington & Company, after they had been assigned by Quick to them, he would have no right or authority to cancel such policies as against Farrington & Company, while owned by him, and he was in possession of such policies, without at least returning the unearned premiums to them." The above instructions are the only ones to which exception is taken. There is no error in them. Finding no error in the record, the judgment is accordingly affirmed.

FARMERS' & MERCHANTS' BANK OF NEW SALEM v. E. H.
MANN, M. A. Clark, and W. G. Clark.

(156 N. W. 535.)

Default judgment—relief from—motion for—discretion—abuse of—appearance—failing to make—excusable neglect—defense.

Following the rule announced in *Westbrook v. Rice*, 28 N. D. 324, *held*, under the facts, that it was an abuse of discretion to deny defendant's motion to be relieved from a default taken against him through his excusable neglect in failing to appear and interpose his defense at the time the issues were set for trial.

Opinion filed February 9, 1916.

Note.—For cases upon reliance upon receiving notice from opposing counsel as excuse for default, see note in 4 L.R.A.(N.S.) 196.

Appeal from the District Court of Morton County, S. L. *Nichols*, J. From an order denying defendant's motion to be relieved from a default, he appeals.

Reversed.

W. H. Stutsman, for appellant.

Excusable neglect in looking after his case, either by litigant or attorney, is a lack of attention to the progress of the cause, or failure to attend the trial, which is fully explained and justified by the peculiar circumstances of each case, and among the instances is the well-founded belief that the case would not be reached for trial as soon as it was. *Westbrook v. Rice*, 28 N. D. 324, 148 N. W. 827; *Cameron v. Carroll*, 67 Cal. 500, 8 Pac. 45; *Re Davis*, 15 Mont. 347, 39 Pac. 292; *Citizens' Nat. Bank v. Branden*, 19 N. D. 489, 27 L.R.A.(N.S.) 858, 126 N. W. 102.

J. V. McCormick, for respondent.

In entering default judgments, the action of the trial court will not be disturbed, if it appears to have been the result of appellant's carelessness or heedlessness, or lack of diligence in protecting his own interests. 23 Cyc. 894.

Laxity and negligence are not to be encouraged in the members of the bar or practicing attorneys. A misapprehension, which in truth is well justified, as to the status of a cause upon the trial calendar, may afford a good excuse for seeming negligence. But there is no such showing in this case. *Westbrook v. Rice*, 28 N. D. 324, 148 N. W. 827.

Fisk, Ch. J. This is an appeal from an order refusing to relieve defendant from a default. The cause was at issue in September, 1912, and was by plaintiff duly noticed for trial at the December, 1912, term of the district court of Morton county, but the same was not forced to trial at such term nor at any subsequent term by either party; but the same was continued over each term by consent, until it was reached in its regular order at the December, 1913, term, at which time, in the absence of counsel for either party, the same was set for trial as the 13th jury case. At the time the case was reached, defendant and his counsel were absent and a jury was impaneled, testimony submitted by plaintiff, and a verdict directed by the court in plaintiff's favor for

the full sum prayed for in the complaint, to wit, \$1,339.09. Pursuant thereto judgment was ordered accordingly.

Concededly, the answer sets forth a perfect defense on the merits, and the sole question for determination is whether the showing made on the motion to vacate the verdict and order for judgment was sufficient to excuse the default and entitle defendant to interpose his defense. In other words, did the trial court properly exercise a sound discretion in denying such relief?

In view of the fact that, aside from the usual affidavit of merits made by the defendant, the sole showing on the motion consisted of an affidavit of defendant's counsel, which stands wholly unchallenged, we deem it advisable to set out such affidavit in full. Omitting formal parts, it reads:

"W. H. Stutsman, first being duly sworn, on his oath deposes and says: That the summons and complaint in the foregoing action were served upon the defendant, E. H. Mann, upon the 21st day of August, 1912, and the affiant was employed by said defendant to conduct the defense of said action; that affiant prepared and served upon the plaintiff an answer on behalf of said defendant upon the 19th day of September, 1912; that the cause of action set forth in said complaint was based upon three certain promissory notes executed and delivered by said Mann to his codefendant, M. A. Clark, and indorsed by said M. A. Clark and the other defendant, W. G. Clark, to the plaintiff; that said notes were given as part of the same transaction whereby M. A. Clark undertook to sell and this defendant undertook to buy certain land in Mercer county, North Dakota, and said notes represented the deferred payments upon said purchase and sale, but by reason of said M. A. Clark not having any title to the land involved and becoming unable to convey the same to this defendant, the consideration of said notes wholly failed and the defendant ceased to be liable thereon; that in said answer this defendant set out these facts and denied the allegation of the complaint that said notes were purchased by plaintiff for a valuable consideration, before maturity, and in due course of business, and alleged that plaintiff purchased said notes with full knowledge and notice that the same were not negotiable and that defendant might have a valid defense to the payment of the same, and that plaintiff purchased said notes subject to all the equities between this defendant and said

M. A. Clark, and subject to the defense above set out; that a copy of said answer is hereto attached and made a part hereof and marked exhibit "A," and affiant further states that if permitted to defend said action and try the same upon the merits, defendant will be abundantly able to prove said facts and to establish a complete defense to said cause of action.

"That neither of the other of the defendants were ever served with the summons herein, nor have they been brought into court in any way to determine their liability upon their indorsements upon said notes, but upon the 20th day of November, 1912, a trial notice was served upon this defendant alone, and the action was placed upon the trial calendar of this court, and the same has been upon the trial calendar of said court at each term of court thereafter, for trial against this defendant alone; that this defendant has been at all times ready and willing to try said action upon the merits, but as defendant resides at Hebron, some 60 miles distant from the county seat, and plaintiff and its counsel reside at New Salem, some 30 miles from the county seat of said county, neither of said parties prepared for trial upon a day certain, nor insisted that the other party should be ready to take up the trial at the time the case should be reached in its regular turn or at any particular time, and so at each term of court the case went over till the next term by mutual consent; that at the next last preceding term of court said case was about to come on for trial at its regular turn, and affiant, who resides at the county seat, was ready and willing to take up said trial, but would have to notify defendant his client at Hebron a day or so before the trial, and asked Mr. George M. Kremer, counsel for plaintiff, whether he would insist upon trying said case, but Mr. Kremer replied that he would be unable to try said case at that time as he would have to take the deposition of a witness in a foreign state, and so, by consent, the case went over the term again; but from the remark made by Mr. Kremer, affiant was misled into believing that said case would not be tried until the deposition referred to had been taken, and as no step was ever taken by Mr. Kremer to take said deposition prior to the December, 1913, term of court, this affiant rested secure in the feeling that it was Mr. Kremer's 'next move' and that the trial of the action on the part of plaintiff would not be moved until after this deposition was taken.

"That the December, 1913, term of court convened on December 1st, and an informal call of the calendar was had, and in the absence of counsel on both sides said case was set for the 13th jury trial; that affiant was called by important legal business to the city of Fargo, on November 28th, and was unable to complete the same and return to the city of Mandan until the night of December 1st, and hence was not able to be present at the opening of court and the call of the calendar, but, upon the morning of the 2d day of December, affiant went to the court room of this court, and, borrowing the calendar of the judge hereof, attempted to mark up in his own calendar the cases set for trial, but by some oversight, which he cannot explain further than that he copied the entries out of the judge's calendar without noticing carefully the names of the cases, affiant failed to discover that the action here involved was marked as for the 13th jury trial, or at all.

"That this affiant is a state official of the state of North Dakota, being a member of the board of railroad commissioners, and as such official it is often necessary for him to be absent from his law offices for several days at a time, but affiant always makes it a point to arrange for the postponement of such matters as are likely to be reached or tried during such absences, and has never before found it difficult to so arrange his legal business as to accommodate it to his official duties; that as such official, affiant is a member of a committee of railroad commissioners of the various states upon express rates and express service, and in the performance of his said duties it was necessary for him to be in the city of Chicago, during the week of December 8th to December 15th, 1913, in attendance upon a meeting of said committee, and prior to his departure for said meeting he arranged with counsel in those cases he thought likely to be tried during said week for the postponement thereof until his return, but affiant, having entirely overlooked the fact that this case had been placed upon the list of cases for trial, in fact, being ignorant of such fact, or even that the same had been set for trial before a jury, neglected to make any arrangement for the postponement of said case, and left town in entire ignorance that there was any danger or likelihood of said case being reached for trial during his absence.

"That during his absence in Chicago, and during said week, said action was placed upon the preemptory call and was reached for trial

before affiant returned home, and without his having any knowledge thereof, and plaintiff procured an order for judgment against this defendant as upon a default, for the full amount of said notes, in the sum of \$1,300; that there were twelve jury cases set for trial ahead of the case of defendant, and if any considerable number thereof had been tried, the case of defendant would not have been reached till after affiant's return, but most of said cases were settled, continued, or otherwise disposed of without trial, so that the case of defendant was reached much sooner than it otherwise would have been; that affiant was unaware of such action of plaintiff until the 17th day of December, when he accidentally learned that judgment had been entered, and he immediately wrote to Mr. G. M. Kremer, at New Salem, asking that he consent to the reopening of said case, and upon the receipt of his refusal to consent thereto, December 23d, he at once commenced this proceeding.

"Affiant further states that at the informal call of the calendar, December 1st, 67 cases were set for trial before the jury, and said cases are still being tried, and there are still enough untried cases set ahead to keep the jury busy for the next two weeks, so that if said order for judgment should be reopened and the case again set for trial the same can be tried at this term of court, before a jury, without loss of time to the plaintiff, and the defendant will be ready to try the same.

"Affiant further states that by reason of the foregoing facts the order for default judgment taken against the defendant was taken through his mistake, inadvertence, surprise, and excusable neglect.

"Wherefore defendant prays that said order for judgment be set aside and reopened, and that this defendant be permitted to make his defense to the cause of action set up in the complaint.

"(Signed) W. H. Stutsman."

We are agreed that the learned trial court abused his discretion in denying the motion. Such motion was promptly made, and it appears from the above affidavit that there was no reason why the case could not have been tried at the same term at which such default was taken, without any great inconvenience either to the court or to plaintiff and his counsel. There is nothing in the record from which bad faith in any respect can be imputed either to defendant or his counsel. The law, of course, favors a trial on the merits where this can be accom-

plished without injustice to the opposite party. *Citizens' Nat. Bank v. Branden*, 19 N. D. 489, 27 L.R.A.(N.S.) 858, 126 N. W. 102; *Westbrook v. Rice*, 28 N. D. 324, 148 N. W. 827. Much that is said in the opinion in the latter case is strikingly applicable to the case at bar, and we adopt the reasoning and conclusions there announced as controlling on this appeal. Defendant's counsel had good reason to believe that the case would not be forced to trial. It had been continued over several terms by consent, and plaintiff's counsel had stated that he could not go to trial without first procuring the deposition of a necessary witness. In the light of all the facts as disclosed in the above affidavit, we think the default was clearly excusable, and hence it was an abuse of discretion to deny the motion. In view of the fact that, as a condition to the granting of such motion, terms might properly have been imposed to cover the additional costs which plaintiff would be obliged to incur, we have concluded to allow appellant no costs on this appeal. The judgment which has been entered will also be allowed to stand as security for any recovery which plaintiff may finally obtain. Order reversed.

MARTIN PAULSON v. J. A. REEDS.

(156 N. W. 1031.)

Suit for commission for furnishing purchaser for real estate, the terms of the listing contract being in dispute.

Instructions to jury — commissions — real estate agent — furnishing buyer — contract.

1. Instructions of the court examined and found correct in all particulars excepting the part which instructs the jury that the signing of exhibit "A" settled the controversy relative to the amount of the commission. For reasons stated in the opinion, this is error which necessitates a new trial.

Defendant — letters — statements — inconsistent with present theory — admissions against interest.

2. A certain letter written by defendant to a banker, containing statements inconsistent with his present theory of the commission contract, was properly received as an admission against interest.

Plaintiff — defendant — dunning letter — threatened arrest — bias and prejudice — questions — examination of witness.

3. It was error to ask the defendant whether he had not attempted to have plaintiff arrested for sending him a dunning letter, without first giving the witness a chance to admit his bias and prejudice against the plaintiff.

Opinion filed February 11, 1916.

Appeal from the District Court of Richland County, *Pollock, J.*
Reversed.

W. S. Lauder, for appellant.

It is the law that where a party sues on an express contract he cannot recover on an implied contract or on *quantum meruit*. 9 Cyc. 749, et seq.; *Wernli v. Collins*, 87 Iowa, 548, 54 N. W. 365; *Morrow v. Board of Education*, 7 S. D. 553, 64 N. W. 1126; *Ball v. Dolan*, 21 S. D. 619, 15 L.R.A.(N.S.) 272, 114 N. W. 998; 2 Enc. Pl. & Pr. 990.

While an appellate court will not disturb a judgment for an immaterial error, yet it should appear beyond a doubt that the error of which complaint is made did not and could not have prejudiced the rights of the objecting party. *Boston & A. R. Co. v. O'Reilly*, 158 U. S. 334, 39 L. ed. 1006, 13 Sup. Ct. Rep. 830; *Deery v. Cray*, 5 Wall. 795, 18 L. ed. 653; *Norfolk & P. Traction Co. v. Miller*, 98 C. C. A. 453, 174 Fed. 607; *Gilmer v. Higley*, 110 U. S. 47, 28 L. ed. 62, 3 Sup. Ct. Rep. 471; *Taggart v. Bosch*, 5 Cal. Unrep. 690, 48 Pac. 1092; *Thomas v. Carey*, 26 Colo. 485, 58 Pac. 1093; *Norfolk & W. R. Co. v. Briggs*, 103 Va. 105, 48 S. E. 521; *Henry v. Colorado Land & Water Co.* 10 Colo. App. 14, 51 Pac. 90; *Cooke v. McAleena*, 18 Misc. 219, 41 N. Y. Supp. 479; *Comaskey v. Northern P. R. Co.* 3 N. D. 279, 55 N. W. 732; *Moore v. Booker*, 4 N. D. 558, 62 N. W. 607; *Hegar v. De Groat*, 3 N. D. 354, 56 N. W. 150; *McKay v. Leonard*, 17 Iowa, 569; *Freeman v. Rankins*, 21 Me. 446; 1 Hayne, New Tr. & App. Rev. ed. § 26, subd. 2, 2 Hayne, New Tr. & App. Rev. ed., § 287; *Rulofson v. Billings*, 140 Cal. 452, 74 Pac. 35.

A party cannot insist upon the admission of improper evidence over objection to its admissibility and then defend his course by contending that the error was harmless. *Smith v. Westerfield*, 88 Cal. 374, 26 Pac. 206; *Lissak v. Crocker Estate Co.* 119 Cal. 442, 51 Pac. 688;

Re James, 124 Cal. 653, 57 Pac. 578, 1008; Helling v. Schindler, 145 Cal. 303, 78 Pac. 710, 17 Am. Neg. Rep. 177.

An offer of payment made in the way of a compromise, or to avoid litigation, cannot be shown as an admission on the part of the one making the offer that he is in fact indebted to the party to whom such offer is made. Pelton v. Schmidt, 104 Mich. 345, 53 Am. St. Rep. 462, 62 N. W. 552; Dwight v. Hayes, 150 Ill. 273, 41 Am. St. Rep. 367, 37 N. E. 218.

It is competent for a party sought to be held on a written contract to show by parol evidence that when he signed the same it was agreed that it should not be held binding except upon some future contingency, upon the happening of some future event, or not at all. Burke v. Dulaney, 153 U. S. 228, 38 L. ed. 698, 14 Sup. Ct. Rep. 816, and cases there cited.

The rule excluding parol evidence, where it contradicts a written contract, presupposes the existence in fact, of such contract, and has no application if the writing was not delivered as a present contract. Pym v. Campbell, 6 El. & Bl. 373, 25 L. J. Q. B. N. S. 277, 2 Jur. N. S. 641, 4 Week. Rep. 528; Davis v. Jones, 17 C. B. N. S. 625, 25 L. J. C. P. N. S. 91, 4 Week. Rep. 248; Wallis v. Littell, 11 C. B. N. S. 369, 31 L. J. C. P. N. S. 100, 8 Jur. N. S. 745, 5 L. T. N. S. 489, 10 Week. Rep. 192; Wilson v. Powers, 131 Mass. 539; Pawling v. United States, 4 Cranch, 219, 2 L. ed. 601; Lindley v. Lacey, 17 C. B. N. S. 585, 34 L. J. C. P. N. S. 7, 10 Jur. N. S. 1108, 11 L. T. N. S. 273, 13 Week. Rep. 80; Clever v. Kirkman, 33 L. T. N. S. 672, 24 Week. Rep. 159; Gudgen v. Besset, 6 El. & Bl. 986, 26 L. J. Q. B. N. S. 36, 8 Eng. Rul. Cas. 612; 2 Taylor, Ev. 8th ed. § 1135; 17 Cyc. 642, cases cited under note 46; Branson v. Oregonian R. Co. 11 Or. 161, 2 Pac. 86.

The fact as to whether or not actual delivery of a contract was ever made, or that such contract was intended by the parties as a present, effective contract, where the evidence is conflicting, is a question for the jury. Taylor v. Jones, 3 N. D. 235, 55 N. W. 593; Jackson v. Grand Forks, 24 N. D. 601, 45 L.R.A.(N.S.) 75, 140 N. W. 718; Clemens v. Royal Neighbors, 14 N. D. 116, 103 N. W. 402, 8 Ann. Cas. 1111; Houghton Implement Co. v. Vavrowski, 19 N. D. 594, 125 N. W. 1024; Edwards v. Chicago, M. & St. P. R. Co. 21 S. D. 504, 110

N. W. 832; *Hall v. Northern P. R. Co.* 16 N. D. 60, 111 N. W. 609, 14 Ann. Cas. 960; *Walkin v. Horswill*, 24 S. D. 191, 123 N. W. 668; *Berry v. Chicago, M. & St. P. R. Co.* 24 S. D. 611, 124 N. W. 859; *Casey v. First Nat. Bank*, 20 N. D. 211, 126 N. W. 1011; *Charles E. Bryant & Co. v. Arnold*, 19 S. D. 106, 102 N. W. 303; *Unzelmann v. Shelton*, 19 S. D. 389, 103 N. W. 646; *Comeau v. Hurley*, 24 S. D. 255, 123 N. W. 715; *Olson v. Day*, 23 S. D. 150, 120 N. W. 883, 20 Ann. Cas. 516; *Mosteller v. Holborn*, 20 S. D. 545, 108 N. W. 13; *Grant v. Powers Dry Goods Co.* 23 S. D. 195, 121 N. W. 95; *Leisen v. St. Paul, F. & M. Ins. Co.* 20 N. D. 316, 30 L.R.A.(N.S.) 539, 127 N. W. 837, and cases cited; *Stotlar v. German Alliance Ins. Co.* 23 N. D. 346, 136 N. W. 792, and cases cited.

To entitle a real estate broker to a commission on the sale of land listed with him for sale, he must show that he sold the land, or found a purchaser ready, willing, and able to buy it *on the terms and conditions* upon which he was authorized to sell it. *Anderson v. Johnson*, 16 N. D. 174, 112 N. W. 139; *Fulton v. Cretian*, 17 N. D. 335, 117 N. W. 344; *Ames v. Lemont*, 107 Wis. 531, 83 N. W. 780; *McArthur v. Slauson*, 53 Wis. 41, 9 N. W. 784; *Ball v. Dolan*, 18 S. D. 558, 101 N. W. 719; *Milligan v. Owen*, 123 Iowa, 285, 98 N. W. 792; *Wenks v. Hazard*, 149 Iowa, 16, 127 N. W. 1099; *Cook v. Forst*, 116 Ala. 396, 22 So. 540; *Steinfeld v. Storm*, 31 Misc. 167, 68 N. Y. Supp. 966; *Reiger v. Bigger*, 29 Mo. App. 428.

Wolfe & Schneller, for respondent.

The agreement in this case was that if the plaintiff should find a purchaser for defendant's land, he should have as his compensation all received over and above a fixed price per acre; that plaintiff was to be paid when the sale was finally closed by conveyance; that defendant did not repudiate such contract, but accepted the benefits accruing thereunder, and thereupon became liable for the commission. *Francis v. Baker*, 45 Minn. 83, 47 N. W. 452; *Ketcham v. Axelson*, 160 Iowa, 456, 142 N. W. 62; *Ward v. McQueen*, 13 N. D. 156, 100 N. W. 253; *Goss v. Stevens*, 32 Minn. 472, 21 N. W. 549; *Northern Immigration Asso. v. Alger*, 27 N. D. 467, 147 N. W. 100.

A land broker's commissions are earned and become payable when he brings together the land owner and a purchaser who actually buys the land. *Anderson v. Johnson*, 16 N. D. 174, 112 N. W. 139.

Error must be made to appear, and will not be presumed, because it is claimed. All reasonable presumptions warranted by the record will be indulged in support of the action of the trial court. The trial court, in passing upon a motion or objection, decides a question of fact, upon which fact the ruling is grounded. The appellate court must, in the absence of a showing to the contrary, take that fact as conclusively established. Paulson v. Reeds, 24 N. D. 211, 139 N. W. 1135.

BURKE, J. Defendant listed 800 acres of land for sale. Unfortunately, the contract was not reduced to writing, and there is a dispute not only as to the price and terms which he desired, but the amount of commission which he should pay. Plaintiff's version is that first in 1909, again in January, 1910, at least once between January and June, and again on June 28, 1910, the subject of commissions was discussed. That just prior to the sale itself when the contracts with the purchaser were awaiting signature, defendant promised to pay his commission upon the sale actually made.

He testifies:

After he (Reeds) read this little statement there he say, "I can't pay you a commission on that, Paulson." "Well," I says, "that is not to you." Then he says, "What do you get for it—I suppose you get \$20 an acre?" I said, "No, I don't. I get \$17.50." He says, "All right," and then he signs it. That was all there was to it. . . .

Q. Now, Mr. Paulson, when these contracts were signed by Mr. Reeds and Mr. Huey in your office, I mean the contracts, exhibit "B" (by which the land was sold), was there anything said between you and Mr. Reeds at that time about the payment of commissions, or what should become of the excess of the purchase price of these lands over \$16 an acre?

A. Yes, sir.

Q. What was that?

A. He said that I can't pay your commissions out of these payments. "Well," I said, "I will wait until the November 15th settlement is made for my commissions."

Q. When did you have that talk, before or after the contract, exhibit "B" was signed?

A. Before.

Plaintiff had already testified that he was to receive as his commission all over \$16 an acre of the purchase price. He had also testified that the first listing proposition had with defendant was one third cash and deferred payments to bear 6 per cent interest. Defendant's contention is that he listed the land for sale at \$17.50 per acre, one third cash, deferred payments 7 per cent. That the commission should be \$1 per acre if plaintiff furnished the buyer himself, but that if the sale was made to a purchaser who was introduced to plaintiff by the defendant, the commission should be 50 cents per acre. It thus appears that there are two separate disputes: first, as to the terms upon which the lands could be sold; and, second, the amount of the commission to be paid for producing a purchaser. These questions were necessarily complicated in the trial below by the injection of exhibit "A,"—a paper signed by defendant at plaintiff's request, just prior to the sale, and reading as follows:

Wyndmere, N. D., June 28, 1910.

Martin Paulson:

You are hereby authorized to sell my land, W $\frac{1}{2}$ SE $\frac{1}{4}$ 21, and E $\frac{1}{2}$ of 20, 133-52, at \$16 per acre net to me.

(Signed) J. A. Reeds.

It will be noticed that this merely authorizes a sale of the land at \$16 per acre, but does not mention the matter of commissions, we having already held in *Louva v. Worden*, 30 N. D. 401, 152 N. W. 689, that using the word "net" does not amount to a contract to pay all of the purchase price over the net to the agent. The jury found for plaintiff in the full sum demanded, \$1,200. No motion for a new trial was made, and the matter is before us upon assignments of error. The trial below occurred before the *Louva v. Worden*, *supra*, and *Harris v. Van Vranken*, — N. D. —, 155 N. W. 65, opinions were handed down by this court. Many of the questions raised in the briefs have been decided by those two cases, and will not be further discussed. Plaintiff brings this action upon an express contract alleging that he produced a purchaser able, willing, and ready to buy upon the listing terms. That the land was actually sold upon those terms. That under

his contract he was to receive the difference between \$16 per acre and \$17.50, or \$1,200. The answer of defendant is a general denial.

(1) Appellant's principal assignment challenges the court's instructions to the jury. He insists that the court told the jury that the contract regarding the commissions was contained in exhibit "A" alone, and that if they found as a matter of fact that defendant had signed exhibit "A," then plaintiff was entitled to recover \$1,200. If the charge bears this interpretation, it is clearly erroneous. An examination of the whole charge becomes necessary, and we quote from the charge covering this phase: "Plaintiff contends . . . that Mr. Paulson was authorized by Mr. Reeds, the defendant, to sell the land described in the complaint, amounting to 800 acres, for the sum of \$16 an acre net to Mr. Reeds; . . . that in pursuance of said contract Paulson did sell the land to Mr. Huey for \$17.50 per acre; . . . that the entire compensation therefore would be \$1,200; . . . the defendant . . . admits that there was some talk to the effect that if a sale was made he would give him \$1 an acre if he sold the land for \$17.50 an acre, but in that event he claims that the land must be sold in such a manner that the defendant could have one third of it in cash and 7 per cent interest on all deferred payments. . . . He contends that in the event he, Reeds, brought the purchaser to Paulson . . . in that event, he, Reeds, would pay to said Paulson the sum of 50 cents an acre for his services. . . . He denies that at the time of signing the contract with Mr. Huey, exhibit 'B,' that there was any further or additional contract; . . . he further claims that, before signing the contract with Mr. Huey, he did not agree to any modification or change whatsoever in the contract as claimed by Mr. Paulson, as above set forth, and that the reason why he signed the contract was that at that time Paulson agreed that the question of commissions should be later adjusted between the two. . . . You will see that before you can proceed further, it will be necessary for you to find what the contract between the parties was. . . . There is, as I understand it, a dispute as to whether Mr. Reeds signed exhibit 'A,' and perhaps the first thing for you to do will be to determine this disputed question. The burden of proof is upon the plaintiff to show that Mr. Reeds signed this exhibit. You will observe that exhibit 'A'—and I so charge you—is not a complete contract, as

it does not provide for interest and payments in case of a sale, and, therefore, to determine as to the terms and conditions upon which plaintiff was authorized to sell the land you are to consider all the evidence of the case. It is contended by the plaintiff that the terms not mentioned in exhibit 'A' were that the land should be sold at one third cash at the time of the giving of the deed, and interest was to be at the rate of 6 per cent per annum. Whereas the defendant insists that the terms as to time and rate were that the one third should be paid at the time of the making of the contract, and that interest was to be figured at the rate of 7 per cent per annum. If you find, by a preponderance of the evidence, the burden being upon the plaintiff, that the defendant, Reeds, signed exhibit 'A,' then that settles the contract as between them in so far as Paulson's authority to sell the land at \$16 per acre net to Mr. Reeds is concerned. In that event, to determine what the other portions of the contract were, you will look to the other evidence to find what the time of making the payments and the rate of interest were to be. This is not an action to recover the reasonable value of the services of Mr. Paulson, if any he performed. As called at law, it is not an action upon *quantum meruit*, but is based upon a contract for a specific sum, and the obligation now falls upon you, gentlemen, to determine what that contract was. There has been a good deal of evidence offered and presented to you, and under the rules of law you are to consider it all for the purpose of trying to put yourselves in the situation of the parties when having the transaction about which testimony has been given. In making up your judgment as to what the contract was, you ought to consider all the testimony, whether the conversations happened on one day or whether they continued through several days or weeks, provided it was one continuous transaction and had reference to the making of the deal in question, if upon all the testimony you find that the contract was for 50 cents an acre, . . . he would be entitled to a verdict of \$400. If you believe by a preponderance of the evidence that the defendant, Reeds, signed exhibit 'A' and thereafter entered into the contract, exhibit 'B' under the terms as therein stated, . . . then I charge you that the plaintiff would be entitled to a judgment for the sum of \$1,200 and interest at the rate of 7 per cent from and since November 15, 1910; the principle of law being that where a person agrees with a real estate broker to pay him

a commission if he procures a purchaser on specified terms, the broker, in order to entitle him to his commission, is bound to present a purchaser who is ready, able, and willing to buy on the proposed terms; . . . and if, without any fraud, concealment or other improper practice on the part of the broker, the principal accepts the person presented, either on the terms previously proposed, or on modified terms, then agreed upon, and enters into a binding and enforceable contract with him for the purchase of the property, the commission is fully earned. . . . If you believe by a preponderance of the evidence that exhibit 'A' was signed and delivered to Mr. Paulson, and you further believe that there was a dispute between Reeds and Mr. Paulson as to the time of the cash payment and the rate of interest, it was the duty of Mr. Reeds when the contract, exhibit 'B' was presented, to repudiate the same, refuse to sign it, and cancel the agency of Mr. Paulson; . . . or declare that he would not accept the trade upon any other terms than those for which he was contending. But if he did not do that for any reason, and accepted the terms of the contract as made by exhibit 'B,' then he would be regarded in law as having approved such terms, and, having entered into the contract, he would be required to pay the commission agreed upon. If his consent to enter upon the agreement was induced by any other evidence or offer, that question cannot be heard at this time to modify or reduce the amount coming to the plaintiff Paulson under the terms of the contract, as you shall have found it to be. . . . If you find that Mr. Reeds did not sign exhibit 'A' . . . you are still to say whether from the talk between the parties, Mr. Reeds did agree to give Mr. Paulson any compensation whatever,—and when you find out what it was, then the same rules will apply as to the liability of Mr. Reeds as I have heretofore described with reference to his liability in case you shall find that he signed the exhibit 'A.' ”

Much of the charge given is correct, but we cannot escape the fact that the court understood the signing of exhibit "A" to settle the question of commission at \$1.50 per acre. In this there was error. Much has been written upon the subject of brokers' and real estate agents' commissions. Valuable notes will be found in 21 L.R.A.(N.S.) 935; 29 L.R.A.(N.S.) 533; 34 L.R.A.(N.S.) 1050; and 139 Am. St. Rep. 225; 2 Hill's Dakota Dig. pp. 174-177. There is nothing unusual

about a real estate commission contract. It is governed largely by the ordinary rules of contracts. If the agent is to furnish a buyer at \$16 an acre and receive all he can get from the purchaser over that sum as his commission, that is one contract. If he is to furnish a buyer and receive \$1 an acre as his commission, that is another contract. If he is to furnish a buyer with whom the owner makes a satisfactory contract, and is to receive as his commission a certain percentage of the purchase price, that is still another contract. The last-mentioned state of affairs presents different problems entirely from the one in the case at bar. Respondent has cited us to a few cases based upon this last kind of contract as precedent for the case at bar, but obviously they have no application. In the case before us there were two disputes,—one as to the terms upon which the land could be sold, second, as to the amount of the commission to be paid. The trial court correctly outlined the issues as to the first dispute, and correctly outlined the issues as to the second dispute, excepting that he told the jury that if he had signed exhibit “A,” then the question of commissions was settled at \$1,200. This, we think, is erroneous. If it is kept in mind that the commission is earned when the purchaser able, willing, and ready to buy according to the listing terms is found, a better understanding of the law will obtain. After the purchaser has been produced and the commission earned, the owner and the purchaser may change the terms all they please, and it does not affect the matter of the commission. Much of the so-called confusion of the cases results from a failure to keep this simple proposition in mind. Our own court in *Ward v. McQueen*, 13 N. D. 153, 100 N. W. 253, failed to make this plain although they did say, after setting out the facts, “this shows *a full performance by plaintiff* of the duties of the employment *under the listing contract* and entitled them to their commission. . . . The terms of sale agreed upon and assented to by the defendant were different in some respects from those stated in the listing contract. For this reason it is contended that the plaintiffs are not entitled to the compensation provided for in the agency contract, but that they must show that the defendant expressly agreed to allow the same compensation for the sale upon the modified terms as was fixed by the agency contract. . . . There is no merit in this contention.”

It is evident that the court had in mind the fact that the commission had already been earned, and it made no difference that thereafter the actual sale was made on slightly different terms. The balance of the opinion is therefore *obiter*, and we fear overlooked this basic principle,—that the agent must have first produced a purchaser able and willing to take the land under the listing contract, and that, having produced such a purchaser, it was immaterial that the sale is made upon different terms. For that matter, it was not material whether the sale is made at all. That this was the law appears from the citations given by this court towards the bottom of page 156 of said opinion. The first case cited is *Huntemer v. Arent*, 16 S. D. 465, 93 N. W. 653. We quote from the syllabus in that case, the italics being ours: “1. Evidence in an action by a real estate broker for commissions considered, and held to show that the *broker had procured a purchaser able, ready and willing to purchase on terms acceptable to the owner*, and that a failure to complete the sale was the owner’s fault. 2. The fact that the terms of sale of realty, as stated to a broker, were modified by the owner’s acceptance, in the broker’s presence, of the purchaser’s proposal as to the method of payment, would not relieve the owner from liability for commissions.”

The second case is *Knowles v. Harvey*, 10 Colo. App. 9, 52 Pac. 46. Again we quote from the syllabus, italicizing the portions we wish to emphasize: “1. When a broker in whose hands property has been placed to exchange, finds a person who is *willing to trade on the first party’s proposition*, and he brings the parties together, with the result that a trade is made, though on somewhat different terms than in the original proposition, he earns a commission.”

The third case cited, *Magill v. Stoddard*, 70 Wis. 75, 35 N. W. 346, is to the same effect. Paragraph 2 of the syllabus reads: “Plaintiffs, real estate agents, agreed for a certain per cent on the price, to procure a purchaser for defendant’s land. The evidence showed that plaintiffs *procured a purchaser for the land on the terms agreed upon*, and that defendant then refused to sell but wanted a higher price. Held, that the evidence warranted a verdict for plaintiffs for the agreed compensation.” From the body of the opinion we quote: “There was evidence that the parties made another contract in November, following.

. . . The instruction of the court that this new arrangement to sell on different terms would not destroy the plaintiffs' right to recover the commissions they had already earned, . . . was clearly correct. . . . The new contract, therefore, cuts no figure in the case on this appeal."

In *Welch v. Young*, — Iowa, —, 79 N. W. 59, it is said: "There is no doubt that Mr. Bennett was able, willing, and anxious to perform the contract on his part; but it appears that the defendants were unable to furnish an abstract of clear title at that time, wherefore the contract was not performed." In the syllabus it is said: "An agent employed to effect a sale of land is entitled to compensation where he obtains a person who executes a contract with the owner, and is able, anxious and willing to perform, but, because of the owner's inability to furnish a sufficient abstract of title, the sale is not consummated." It is therefore apparent, first, that *Ward v. McQueen* is subject to the criticism above mentioned. The conclusion is right, though part of the reason is wrong. The correct rule is stated by this court in *Anderson v. Johnson*, 16 N. D. 174, 112 N. W. 139, where it is said: "It seems to have been the theory of plaintiff's counsel and also the trial judge that all it was necessary for them to prove in order to recover was the existence of the contract as pleaded, and that they produced the person claiming to own the property, and he, in fact, entered into a contract with defendant to sell the same to him upon some terms acceptable to defendant. In other words, even though Staiger was unwilling and refused to sell at the price of \$2,300 [the listing contract] that, if defendant dealt with him on any other terms whatever, plaintiffs would still be entitled to their commission. . . . This is clearly erroneous." In respondent's brief and upon oral argument it was insisted that there were but two lines of authority, one being the "Minnesota rule." We do not believe there is any distinction. *Francis v. Baker*, 45 Minn. 83, 47 N. W. 452, cited by respondent in support of this theory, contains the following language: "Where a person agrees with a real estate broker to pay him a commission, if he procures a purchaser for his property on specified terms, the broker, in order to entitle him to his commission, is bound to present a purchaser who is ready, able, and willing to buy on the proposed terms."

And *Ketcham v. Axelson*, 160 Iowa, 456, 142 N. W. 62, also cited

by respondent, contains the following language in the syllabus, paragraph one: "When a broker contracts to procure a purchaser for his principal, who will purchase on terms satisfactory to the latter, and produces a purchaser *who is ready, able, and willing to purchase on such terms*, and with whom the principal enters into an enforceable contract, the broker has earned his commission though the contract is afterwards canceled by the principal without the broker's consent."

It will thus be seen that the only objection to the charge given in this case is the interjection of the paragraph by reference to exhibit "A." If this unfortunate reference had been omitted, there could be no criticism of the charge. It is undoubtedly correct, as stated by the trial court, that if a dispute existed as to that part of the listing contract having reference to the terms upon which the land should be sold, and pending this dispute exhibit "B" was produced and shown to Reeds as plaintiff's version of the listing contract, and Reeds then accepted the same, it would probably be presumed that he had receded from his position upon the contract, and had accepted the version contended for by plaintiff. In such a case he would be liable for *some commission*, either \$1,200 as claimed by plaintiff, or \$400 as claimed by himself, but there would still be a dispute upon this proposition. The trial court evidently considered the signing of exhibit "A" a conclusion of this dispute, and instructed the jury that if Reeds signed exhibits "A" and "B" he would owe the \$1,200 commission. Herein lies the error. Exhibit "A," as we have already shown, does not refer to commissions at all, and this question should have been submitted to the jury upon the oral testimony. For this error a new trial must be had.

2. Shortly after the completion of the sale to Huey, defendant wrote a letter to a banker in Wyndmere, inclosing a check for \$600 payable to Paulson, and stating that this was all that he owed him, and asking the banker to pay the same to Paulson and report to him what Paulson said. The letter has the appearance of having been first written \$1,000 and the 6 written over the 10. This letter was properly admitted as a declaration against interest.

3. While defendant was being cross-examined he was asked whether he had not attempted to have plaintiff arrested because he had sent him a dunning letter regarding this commission. Defendant was not

given an opportunity to admit prejudice or bias against plaintiff, and the admission of the testimony was for that reason error.

There are other assignments of error, but we do not believe they will arise upon a second trial of the action. Judgment is reversed and a new trial ordered.

CHARLES F. GARBUSH And Amy F. Garbush v. JOHN H. FIREY.

(156 N. W. 537.)

Statement of case — certificate trial court — imparts absolute verity — cannot be contradicted — varied or extended — affidavits — Supreme Court — evidence dehors the record.

1. The statement of case as certified by the trial court imports absolute verity, and cannot be contradicted, varied, or extended in the appellate court by affidavits or other evidence *dehors* the record.

Action — pending — when — commencement — termination on appeal — time expired — judgment — satisfaction — action terminated when — jurisdiction.

2. Under § 7966, Comp. Laws 1913, which provides that an action is deemed pending from the time of its commencement until its final determination upon appeal, or the time for appeal has passed, unless the judgment is satisfied, it is *held* that, when the time for appeal has expired the action is terminated, and the trial court has no jurisdiction to hear a motion for a new trial. *Grove v. Morris*, 31 N. D. 8; *Higgins v. Rued*, 30 N. D. 551, followed.

Additional Syllabus on Petition for Rehearing and Application to Remand Record for Amendment.

Record — amending — remanding — application for — time of making — rehearing — application for — pending.

3. An application to remand the record for amendment, made after a decision has been filed and while an application for rehearing is pending, will ordinarily be denied.

Opinion filed December 31, 1916. Rehearing denied February 21, 1916.

Appeal from District Court of Bowman County, *Crawford, J.* From

an order denying a motion for judgment notwithstanding the verdict or a new trial, defendant appeals.

Appeal dismissed.

Porter & Grantham and *Emil Scow*, for appellant.

(Brief filed, by way of written argument, in opposition to motion to dismiss appeal, but no authorities cited.)

On motion to dismiss appeal.

Theo. B. Torkelson and *Curtis & Curtis*, for respondents.

The motion, from the order denying which the appeal is taken, was not made within the statutory period. The order of the trial court, made *ex parte*, extending the time in which to make such motion, was wholly void, because at that time the action was no longer pending. A motion for a new trial cannot be made after the time for appeal from the judgment has expired. Notice of the entry of judgment was duly given. Comp. Laws 1913, § 7820; *Grove v. Morris*, 31 N. D. 8, 151 N. W. 779.

There was no notice given of the motion or of the hearing thereon; no specifications of error, or of insufficiency of the evidence. There was an entire failure to comply with the statute, and the order was made *ex parte*. Comp. Laws 1913, §§ 7656, 7664.

The appellant should have taken his appeal from the judgment within six months after notice of the entry thereof. Not having done so, his remedy of appeal is lost, and was lost at the time of his motion, and the issuance of the order by the court. Additional time in which to appeal cannot be gained by making a motion for a new trial, and this appeal should be dismissed. Comp. Laws 1913, §§ 7820, 7843.

Porter & Grantham, *Emil Scow*, *J. A. Heder*, and *Jno. F. Sullivan* for the applications for rehearing and to remand.

Theo. B. Torkelson and *Curtis & Curtis*, contra.

CHRISTIANSON, J.: This action was tried to a jury in the district court of Bowman county, and resulted in a verdict in favor of the plaintiffs. Judgment was entered pursuant to the verdict on September 5, 1914, and notice of entry thereof served upon the attorney for the defendant on that day. A statement of case was prepared, and,

pursuant to stipulation, presented to, and settled by, the trial judge on November 10, 1914.

Defendant's counsel obtained various orders for stay of proceedings, the last one being obtained on November 10, 1914. No further proceedings were had until on August 9, 1915, when defendant's attorneys made an *ex parte* application for an order extending the time within which a motion for a new trial might be made, and the court thereupon on August 9, 1915, made an order extending the time in which to present a motion for new trial for a period of sixty days. The order of extension reads in part: "This matter coming on to be heard upon the application of the defendant for an order extending the time within which a motion for new trial may be made, and for an order permitting the service of formal notice of motion for judgment notwithstanding the verdict, if required; . . . it is ordered that time within which to present motion for new trial be extended for and during the period of sixty days, and that the defendant be permitted if so advised to file and serve formal notice of motion for judgment notwithstanding the verdict or for a new trial herein, and that the time be extended for a period of thirty days for the doing of any and all things incident to or requisite for the presenting of motion for new trial. . . ."

Defendant's counsel thereafter (without notice to plaintiffs' counsel), filed a motion in writing for judgment notwithstanding the verdict or for a new trial upon the grounds stated in the motion for a directed verdict, and on August 23, 1915, the district court entered an order denying such motion. This appeal is taken from such order. The order appealed from contains the following recital: "At the trial of the above-entitled action, the defendant, having moved the court at the close of plaintiffs' testimony and again at the close of the defendant's testimony to direct a verdict in favor of the defendant and against the plaintiff, and the court having denied said motion, and having at the time reserved the defendant the privilege of moving the court for judgment notwithstanding the verdict or for a new trial. . . ."

Plaintiff's counsel has moved for a dismissal of the appeal on the ground (among others) that defendant failed to move for a new trial or take an appeal until more than six months had elapsed from the date of the entry of judgment, and the service of notice of entry thereof

upon the attorneys for the defendant. In resisting the motion to dismiss, appellant's counsel has filed two affidavits. One affidavit is to the effect "that on or about the 13th day of July, A. D., 1914, being a day of the July term of the district court . . . said affiant . . . made a motion in open court in the above-entitled matter for judgment notwithstanding the verdict. . . ." Another affidavit states "that at the trial of the action at the close of the plaintiff's testimony and at the close of the case (he) moved the court to direct a verdict in favor of the defendant and against the plaintiff; and the court at the time of denying said motion announced that he would reserve to the defendant the right to present a motion for judgment notwithstanding the verdict or for a new trial, and would review the case upon such motion. . . ."

While not material to a determination of this motion, it may be stated that the settled statement of case does not sustain the averments of the affidavits presented by defendant's counsel on this motion. The settled statement shows that the trial court denied the motion for a directed verdict, unreservedly, and in the following words: "The court will deny the motion." The statement fails to show any motion for judgment notwithstanding the verdict or a new trial. This statement of case was presented to the court by defendant, and pursuant to notice and stipulation, certified by the trial judge to be a correct transcript of the evidence and of all proceedings had upon the trial. (Comp. Laws 1913, § 7655.) Obviously this solemn judicial record cannot be impeached by affidavits in this court. 3 Cyc. 152 et seq.; *Heard v. Holbrook*, 21 N. D. 348, 131 N. W. 251.

But even though it be conceded that the facts are as contended for by defendant's counsel, we are still of the opinion that the trial court had no authority to entertain a motion for new trial in this case.

Section 7966, Compiled Laws 1913, provides: "An action is deemed to be pending from the time of its commencement until its final determination upon appeal, or until the time for appeal has passed, unless the judgment is sooner satisfied."

As no appeal was taken from the judgment, the action, under the provisions of the statute above quoted, remained pending in the district court until the time for appeal expired, *viz.*, six months after notice of entry of judgment was served upon defendant's counsel. See *Grove*

v. Morris, 31 N. D. 8, 151 N. W. 779; Higgins v. Rued, 30 N. D. 551, 153 N. W. 389.

In Higgins v. Rued, supra, we said: "After the time for appeal had expired, the action was no longer pending in the district court, and hence it necessarily follows that that court had no authority to entertain a motion for a new trial in a cause no longer pending therein. . . . Appellant's counsel concedes that the trial court has no authority to extend the time in which an appeal might be taken from the judgment. Can a court do indirectly that which it is denied direct authority to do? The answer seems obvious. Appellant, in effect, sought to revive the right of appeal from the judgment after the same had ceased to exist. The motion for new trial was noticed for hearing, and submitted after the time for appeal from the judgment had expired; hence we are not confronted with a situation wherein notice of motion for a new trial is served within the six-months period after the service of notice of entry of judgment, and brought on for hearing and submitted within that period, but decided by the court after the expiration thereof, and do not pass upon that question.

"We have no hesitation, however, in saying that in a case like the present, where the motion is served after the expiration of the year [now six months], the trial court has lost jurisdiction." Grove v. Morris, 31 N. D. 8, 151 N. W. 779, 780. This language is equally applicable to the case at bar.

The mere fact that the trial judge intimated, in denying the motion for a directed verdict, that defendant's counsel could obtain a review of this ruling by moving for judgment notwithstanding the verdict or for a new trial, does not take this case from under the rule announced in these two cases. Defendant's counsel concedes that no formal motion for judgment notwithstanding the verdict or for a new trial was made until August 23, 1915, or almost one year after the service of notice of the entry of judgment. The *ex parte* order of extension entered August 5, 1915, and the order denying the motion for judgment notwithstanding the verdict or a new trial entered August 23, 1915, were both entered pursuant to proceedings had in a cause no longer pending in that court. In view of the fact that defendant's chief counsel resides in South Dakota, it may be mentioned that South Dakota has a

statute similar to § 7966, Comp. Laws, and the South Dakota supreme court has construed the same even more strongly against defendant's contentions than this court has been required to do. *Bright v. Juhl*, 16 S. D. 440, 93 N. W. 648. See also *Glaspell v. Northern P. R. Co.* 144 U. S. 211, 36 L. ed. 409, 12 Sup. Ct. Rep. 593.

The record in this case shows conclusively that this court is precluded from considering the various assignments of error challenging the correctness of the order appealed from. A decision on the merits of the appeal, therefore, would be merely a restatement of the conclusions stated above. Such decision could not possibly benefit either party to the litigation. Under such circumstances it would be useless to require the parties to go to the expense of presenting the merits of the appeal, and, hence, the appeal will be dismissed. *Re Kaeppler*, 7 N. D. 307, 75 N. W. 253. See also *Re Heldt*, 98 Cal. 553, 33 Pac. 549; *Saxon v. Hardin*, 29 Okla. 17, 118 Pac. 264.

The appeal is dismissed.

CHRISTIANSON, J. A petition for rehearing, which evidences both skill and diligence, has been filed by counsel who had no former connection with the case. And in conjunction with the petition for rehearing an application is made to have the record remanded, to enable the defendant to apply to the trial court for amendment of the record and the statement of case. Some of the proposed amendments would contradict the recitals contained in the former orders of the court, including the order from which the appeal is taken. But even though all of the proposed amendments were granted, this court would still be precluded from considering the merits of the appeal. Hence, it would be an idle and useless ceremony to remand the record for correction.

It is difficult, however, to understand why this request should be made at this time. If the record was incomplete or incorrect, appellant's counsel must have become aware of this fact at least when the notice of motion for a dismissal was served upon them. At the time the motion to dismiss the appeal was noticed to be heard, defendant's chief counsel were granted twenty days additional time in which to present counter affidavits and a brief in opposition to that motion. Such counsel also appear on the brief filed in support of the application to

remand. No excuse is offered or even suggested for the failure to make timely application for a remand of the record. It is an unusual thing to remand a record for correction and amendment after the case has been decided. And "very special and exceptional circumstances must be shown to obtain leave to have omissions and defects in the transcript or return on appeal supplied after a case has once been decided and an application for a rehearing is pending." (3 Cyc. 144.) In disposing of a similar application in *Ricks v. Bergsvendsen*, 8 N. D. 578, 580, 80 N. W. 768, this court said: "These requests, coming, as they do, after the case has been submitted and decided, and after an opinion has been written and filed, are not seasonably made." Without holding that this court is devoid of authority to grant such a request, under any possible state of facts, we do, without hesitation, hold that similar requests will ordinarily be denied, and will not be granted in any case, unless it presents features which are peculiar and very exceptional, and such as this case does not present." The above language is equally applicable to the case at bar.

It is suggested in the petition for rehearing that this court in its former decision overlooked the holding of this court in *King v. Hanson*, 13 N. D. 85, 99 N. W. 1085. It is only proper to say that the former decision in this case, as well as the decisions of this court in *Grove v. Morris*, 31 N. D. 8, 151 N. W. 779, and *Higgins v. Rued*, 30 N. D. 551, 153 N. W. 389, were prepared after full consideration of *King v. Hanson*. And an examination of those decisions will clearly demonstrate the fact that they are in no manner inconsistent with, or contrary to, the principle laid down in *King v. Hanson*. In *King v. Hanson* the motion for a new trial was fully submitted before the time to appeal from the judgment had expired. The appellant had done everything which he was required to do, and the delay was caused by the failure of the trial court to decide the motion. That is not the condition in this case, because here the defendant concededly obtained permission to make and file his motion after the time to appeal from the judgment had expired. If the proceedings taken and had by the appellant after the time for appeal from the judgment had expired are eliminated from the record, there is absolutely nothing upon which a review could possibly be had in this court. It should be noted, however, that the

motion to dismiss the appeal in *King v. Hanson* apparently was not based upon the ground that the trial court was without authority to determine a motion for new trial after the time in which to appeal from the judgment had expired, but the motion seems to have been based on the ground that an appeal could not be taken from such order after the time to appeal from the judgment had expired.

The decision in *King v. Hanson* was based upon the following principles: "The remedies afforded by an appeal from a judgment and an appeal from an order refusing a new trial are independent remedies," and "The right to appeal from an order denying a motion for new trial may be exercised after the time for appealing from the judgment has expired, provided the appeal is taken within the time limited by statute for appealing from such orders." These principles are doubtless correct, when correctly applied. For instance, under our statute an appeal from a judgment must be taken within six months after service of notice of entry thereof, and an appeal from an order denying a new trial within sixty days after service of written notice of the making of such order. In a case, therefore, wherein a motion for a new trial is made, say five months after the service of notice of entry of judgment, and such motion is denied and notice of the order of denial is served on the last day of the six-month period, under the rule laid down in *King v. Hanson*, the party aggrieved would be permitted to appeal from such order even though the time for appeal from the judgment had expired, provided the appeal was taken within sixty days after the service of notice of such order. This, however, by no means justifies the conclusion that a motion for a new trial may be noticed for hearing, and heard and determined, over the objection of the adverse party, after the time in which to appeal from the judgment had expired. Whether the court has authority to determine a motion for a new trial, submitted within the six-month period, after the expiration thereof, or has authority to continue a motion noticed to be heard within such period, and hear and determine the same after the expiration of such period; or whether such authority can in any event be conferred by agreement or waiver after the expiration of the six-month period,—are questions which do not arise in this case, and upon which we express no opinion. But we do hold that in a case like the present, wherein the proceedings for a new trial

are in reality commenced and the motion in effect noticed, heard, and determined, over the seasonable objection of the adverse party, after the expiration of the six-month period, the trial court has no authority to entertain the motion.

There must be some end to litigation. Public policy demands that there be some point of time when a valid judgment, regularly entered, becomes final and unassailable. The legislature recognized this fact, and its intent as declared by § 7966, Compiled Laws 1913, is that a judgment shall become final and conclusive when the time for appeal has expired, and that no proceedings shall thereafter be instituted, over the objections of the adverse party, for a reversal of such judgment.

The petition for a rehearing and the application to remand the record are denied.

C. W. BUTTZ, as Trustee in Bankruptcy of the Estate of Kitsie G. Burdick, a Bankrupt, v. JESSIE JAMES.

(156 N. W. 547.)

Real estate — conveyance of — unlawful preference — void as — national bankruptcy act — grantee — possession — open — notorious — proof — burden of — method of.

1. Even though a conveyance of real estate may not be void as an unlawful preference under the provisions of § 60a of the national bankruptcy act (act of July 1, 1898, 30 Stat. at L. 562, chap. 541), which, though recorded within four months of the filing of the petition in bankruptcy, is executed and delivered some three weeks prior to the beginning of such four months' period, and where immediately upon such delivery the grantee entered into open, notorious, and hostile possession thereof, and on this question the court expresses no opinion but leaves it to the Federal Courts to decide the burden of proof, of showing this fact is upon the grantee of the property, and the burden is not met by proof merely that a part of the land was cultivated by such grantee

Note.—In analogy with this case, see note in 25 L.R.A.(N.S.) 144, on the effect of recording within the four months' period prescribed in bankruptcy act of 1898, a mortgage for present loan or future advances, particularly page 149, on the application when mortgage is given more than four months prior to bankruptcy but recorded within that period.

and another part farmed by some third party, there being no showing as to whether such third party held under a lease or not, or under whose authority or possession he farmed the same, and nothing is shown as to the use of the balance of the land, and where the land as a whole is admitted to be in several tracts, and to be distant some miles from the place of residence of the grantee.

Additional Syllabus on Petition for Rehearing.

Bankruptcy — schedules — unlawful preference — fraudulent conveyances.

2. When adjudication in bankruptcy has been had, the schedules in bankruptcy are competent evidence, both as against those holding under an unlawful preference and those holding by fraudulent conveyances.

Fraudulent conveyance — bankruptcy — trustee in bankruptcy — recovery of property.

3. Bankruptcy or insolvency at the time of the conveyance is not necessary in order to prove a transfer fraudulent and made for the purpose of hindering and delaying the creditors, so as to entitle the trustee in bankruptcy to a recovery of the property provided there is fraud, and an intent to delay and defraud the creditors, and such fraud and intention are known to the grantee.

Bankruptcy — fraudulent conveyance — trustee in bankruptcy.

4. Property transferred by the bankrupt in fraud of his creditors passes to the trustee in bankruptcy, who takes title for the purposes of his trust.

Opinion filed December 18, 1915. Rehearing denied February 23, 1916.

Appeal from the District Court of Benson County, *Cowan, J.*

Action to set aside a conveyance of real estate as an unlawful preference under the Federal bankruptcy act. Judgment for defendant. Plaintiff appeals.

Reversed.

Statement of facts by BRUCE, J.

This is an action brought by the trustee of a bankrupt estate to set aside a conveyance of some 520 acres of land which was made by the debtor in bankruptcy, and to recover the same for the creditors of the estate. The plaintiff alleges that the petition in bankruptcy was filed by the debtor on the 27th day of August, 1908, and that: (3) "As the plaintiff is informed and believes, the said Kitsie G. Burdick on the 6th day of April, 1908, and after the debts of said Kitsie G. Burdick scheduled in said bankruptcy proceeding had accrued, conveyed by deed to her daughter, the defendant Jessie James, the aforementioned lands and premises, which deed was duly recorded in the office of the register of deeds in and for the county of Benson,

state of North Dakota, and that about the same time she transferred all her other property to this defendant, leaving herself absolutely insolvent; (4) that as the plaintiff is informed and believes the said conveyance was executed by the said Kitsie G. Burdick without consideration and with intent to hinder, delay, and defraud the creditors of the said Kitsie G. Burdick, including those creditors whose claims are included in the bankruptcy schedules of the said Kitsie G. Burdick while said Kitsie G. Burdick was insolvent, and that the defendant, Jessie James, accepted and received said deed and conveyance of all of said property of said Kitsie G. Burdick, with knowledge of said fraudulent intent on the part of the said Kitsie G. Burdick, and with intent on her part to assist the said Kitsie G. Burdick in her said fraudulent purpose, and to hold said lands and other property as a secret trust for said Kitsie G. Burdick."

The findings of fact of the trial court were as follows: (2) "That on the 6th day of April, 1908, one Kitsie G. Burdick was the owner of 760 acres of land in Benson county, state of North Dakota. That on the said date she transferred 520 acres of said land, *viz.*, the west half of the northwest quarter and the southwest quarter of the northwest quarter and the southwest quarter of the northeast quarter of section 33 in township 154 north; range 66, west of the fifth P. M. and the south half of the northeast quarter and the north half of the southeast quarter of section 23, and the east half of the northeast quarter and the southwest quarter of the northeast quarter and the northeast quarter of the southeast quarter and lots 3 and 4 of section 22, all in township 153 north; range 66, west of the fifth P. M. to the defendant in this action, Jessie James, who is a daughter of the said Kitsie G. Burdick; (3) that there were mortgages against said land for \$3,400, which together with accrued interest and unpaid taxes against said land amounted to about \$4,000 when said transfer was made, which said defendant, Jessie James, assumed and agreed to pay as part of the consideration therefor; (4) that said land was of the value of \$6,500 at the time of said transfer, leaving an equity therein of about \$2,500; (5) that the deed to this land was delivered by Kitsie G. Burdick to the defendant at the time of said transfer, and was recorded by the defendant in June, 1908, and said deed and land was in the possession of the defendant since said date; (6) that the defendant, Jessie James, paid and

agreed to pay as a consideration for said land, to the said Kitsie G. Burdick, the sum of \$50 in cash, and also settled and paid an account held by defendant and her husband, John K. James, against Kitsie G. Burdick for labor performed by them for her on the threshing machine and in the cook car of said Kitsie G. Burdick during the threshing seasons of 1906 and 1907. And said defendant assumed and agreed to pay all indebtedness and taxes against said land, amounting to about \$4,000, and agreed as a further consideration to support and care for the said Kitsie G. Burdick and her husband, Orlin L. Burdick, the father and mother of defendant, in their old age; (7) that said Kitsie G. Burdick was still the owner and in possession of 240 acres of land at the time she made this transfer to the defendant, and continued as such owner until May 23, 1908, when she sold the said 240 acres to one Ole S. Aaker; (8) that Kitsie G. Burdick was solvent at the time the 520 acres of land above described was transferred to the defendant herein, and continued to be solvent for some time afterwards, and had sufficient property to pay all of her obligations; (9) that one Orlin L. Burdick acted as the agent of Kitsie G. Burdick in all of these transactions, and was authorized by her to dispose of any or all of the land owned by her in any manner he saw fit, and receive therefor any consideration he might deem adequate, and made this sale of the above described land to the defendant herein, Jessie James; the said Kitsie G. Burdick signing and delivering the said deed after the transaction was closed; (10) that said land sold to Ole S. Aaker was, at a fair valuation of the value, more than sufficient to pay all debts owing by Kitsie G. Burdick; (11) that afterwards and on the 28th day of August, 1908, Kitsie G. Burdick filed her petition and schedules in bankruptcy, in which she listed her debts unsecured in the sum of \$645, and all debts secured and unsecured amounting to about \$1,000; (12) that the transfer of the said 520 acres of land made by Kitsie G. Burdick to the defendant herein, Jessie James, was not made to hinder, delay, or defraud the creditors of said Kitsie G. Burdick, but was made in entire good faith by Kitsie G. Burdick, and that the defendant, Jessie James, acted in entire good faith in purchasing the same." Following such findings the court entered judgment quieting the title to said lands in the said defendant, Jessie James, and from this judgment the plaintiff has appealed.

Torger Sinnes, Henry G. Middaugh, and Rolla F. Hunt, for appellant.

It is the date of the recording of the deed, and not the date of delivery, that is material in bankruptcy proceedings. Until the actual recording of the deed, the land was subject to levy under attachment or execution at the suit of any creditor of the grantor, the debtor. National Bankruptcy Act, § 60a; Rev. Codes, 1905, § 5038, Comp. Laws 1913, § 5594; *Benner v. Scandinavian American Bank* (1913) 73 Wash. 488, 131 Pac. 1149, Ann. Cas. 1914D, 702; *Telford v. Hendrickson*, 120 Minn. 427, 139 N. W. 941; *First Nat. Bank v. Connett*, 5 L.R.A.(N.S.) 148, 73 C. C. A. 219, 142 Fed. 33; *Note to Loeser v. Savings Deposit Bank & T. Co.* 18 L.R.A.(N.S.) 1233; 1 *Emerson, Bankr.* 1382; 1 *Loveland, Bankr.* 499; *Re Sturtevant*, 110 C. C. A. 68, 188 Fed. 196.

But the transfer was in fraud of creditors under the laws of this state. *Bush v. Export Storage Co.* 136 Fed. 918; 30 Stat. at L. 564, § 67e, cl. 3; Comp. Laws 1913, § 7220; Rev. Codes, 1905, § 6640, Comp. Laws 1913, § 7223; 20 Cyc. 439, 461.

Where the transfer is between close relatives the general rule is that the burden of proof is on the defendant to establish fairness and good faith, and adequate consideration. *Adoue v. Spencer*, 62 N. J. Eq. 782, 56 L.R.A. 817, 90 Am. St. Rep. 484, 49 Atl. 10; *Elwell v. Walker*, 52 Iowa, 256, 3 N. W. 70; *Peterson v. Rone*, 76 Iowa, 447, 41 N. W. 68; *Plummer v. Rummel*, 26 Neb. 142, 42 N. W. 336; *Bartlett v. Cheesbrough*, 23 Neb. 767, 37 N. W. 652; *Fluegel v. Henschel*, 7 N. D. 276, 66 Am. St. Rep. 642, 74 N. W. 996.

The participation in the fraud of the vendee, even though full consideration be paid, will render the deed and transaction invalid. *Wood v. Chambers*, 20 Tex. 247, 70 Am. Dec. 382; *Craig v. Zimmerman*, 87 Mo. 475, 56 Am. Rep. 466; *Chapel v. Clapp*, 29 Iowa, 191; *Liddle v. Allen*, 90 Iowa, 738, 57 N. W. 603; *Biddinger v. Wiland*, 67 Md. 359, 10 Atl. 202; *Smith v. Collins*, 94 Ala. 394, 10 So. 334; *Metropolitan Bank v. Durant*, 22 N. J. Eq. 35; *Hathaway v. Brown*, 18 Minn. 414, Gil. 373; *Hough v. Dickinson*, 58 Mich. 89, 24 N. W. 809; *Kansas Moline Plow Co. v. Sherman*, 3 Okla. 204, 32 L.R.A. 33, 41 Pac. 623; *Jones v. Hetherington*, 45 Iowa, 681; *Rindskopf v. Myers*, 87 Wis. 80, 57 N. W. 967; *Dyer v. Taylor*, 50 Ark. 314, 7 S. W. 258; *Holladay*

Case, 27 Fed. 830; *Dodd v. Gaines*, 82 Tex. 429, 18 S. W. 618; *Eureka Iron & Steel Works v. Bresnahan*, 66 Mich. 489, 33 N. W. 834; *Hanchett v. Kimbark*, 118 Ill. 121, 7 N. E. 491.

But the law casts upon the vendee no duty to inquire into the motives or circumstances of his vendor, unless there are brought to his attention or he has knowledge of suspicious facts or circumstances, as seem to have existed here. *State ex rel. Peirce v. Merritt*, 70 Mo. 276; *Baker v. Bliss*, 39 N. Y. 70; *Stearns v. Gage*, 79 N. Y. 102; *Woodworth v. Paige*, 5 Ohio St. 70; *Tuteur v. Chase*, 66 Miss. 476, 4 L.R.A. 832, 14 Am. St. Rep. 577, 6 So. 241; *White v. State*, 103 Ala. 72, 16 So. 63; *Kemmerer v. Tool*, 78 Pa. 147.

A grantee who, before making full payment, receives knowledge that the transfer was fraudulent on the part of his grantor, makes further payments to his grantor at his peril, as to such payments he is regarded as a participant in the fraud, and the conveyance may be up *pro tanto*. *Crawford v. Kirksey*, 55 Ala. 282, 28 Am. Rep. 704; *Rhodes v. Green*, 36 Ind. 7; *Perkins v. Swank*, 43 Miss. 349; *Hedrick v. Strauss*, 42 Neb. 485, 60 N. W. 928; *Davis v. Ward*, 109 Cal. 186, 50 Am. St. Rep. 29, 41 Pac. 1010; *Jewett v. Palmer*, 7 Johns. Ch. 65, 11 Am. Dec. 401; *Frost v. Beekman*, 1 Johns. Ch. 298; *Arnholz v. Hartwig*, 73 Mo. 487; *Kitteridge v. Chapman*, 36 Iowa, 348; *Green v. Green*, 41 Kan. 472, 21 Pac. 586, 16 Am. & Eng. Enc. Law, 838, note; *Clements v. Moore* (*Clements v. Nicholson*), 6 Wall. 299, 18 L. ed. 786; *Sargent v. Eureka Spund Apparatus Co.* 46 Hun, 19.

Notes which are given for the purchase price do not constitute payment as between grantor and grantee, so long as such papers remain in the hands of the grantor. *Freeman v. Deming*, 3 Sandf. Ch. 327; *Partridge v. Chapman*, 81 Ill. 137; *Baldwin v. Sager*, 70 Ill. 503; *Rush v. Mitchell*, 71 Iowa, 333, 32 N. W. 367; *Paul v. Fulton*, 25 Mo. 163; *Dixon v. Hill*, 5 Mich. 404; *Davis v. Ward*, 109 Cal. 186, 50 Am. St. Rep. 29, 41 Pac. 1010; *Daisy Roller Mills v. Ward*, 6 N. D. 317, 70 N. W. 271; *Coiron v. Millaudon*, 19 How. 115, 15 L. ed. 575; *Clements v. Moore* (*Clements v. Nicholson*) 6 Wall. 312, 18 L. ed. 788; *Bean v. Smith*, 2 Mason, 252, Fed. Cas. No. 1,174; 18 Myer, Fed. Dec. 406; *Tompkins v. Sprout*, 55 Cal. 31; *Robinson v. Stewart*, 10 N. Y. 189; *Lobstein v. Lehn*, 120 Ill. 549, 12 N. E. 68.

"If property be conveyed with the design on the part of the vendor, participated in by the vendee, to hinder, delay, or defraud creditors, the vendee's title will not be protected, even though he paid full consideration." *Liddle v. Allen*, 90 Iowa, 738, 57 N. W. 603; *Chapel v. Clapp*, 29 Iowa, 191; *Chapman v. Ransom*, 44 Iowa, 377; *Sweet v. Wright*, 57 Iowa, 510, 10 N. W. 870; *Williamson v. Wachenheim*, 58 Iowa, 277, 12 N. W. 302; *Dokken v. Page*, 77 C. C. A. 674, 147 Fed. 438; *Kansas Moline Plow Co. v. Sherman*, 3 Okla. 204, 32 L.R.A. 33, 41 Pac. 623; *Gress v. Evans*, 1 Dak. 387, 46 N. W. 1132; *Young v. Harris*, 4 Dak. 367, 32 N. W. 97; *Shauer v. Altertton*, 151 U. S. 607, 38 L. ed. 286, 14 Sup. Ct. Rep. 442; *Wood v. Carpenter*, 101 U. S. 135, 141, 25 L. ed. 807, 809; *Kennedy v. Green*, 3 Myl. & K. 722, 21 Eng. Rul. Cas. 820; *Rev. Codes, 1905, § 4099, Comp. Laws 1913, § 4431; 29 Cyc. 49.*

F. G. Kneeland, for respondent.

Many cases hold that recording or registering of deed, under statutes like ours, is not required to complete the transfer, under the application of the bankruptcy act. *Re Hunt*, 139 Fed. 283; *Re Chadwick*, 140 Fed. 674; *Meyer Bros. Drug Co. v. Pipkin Drug Co.* 69 C. C. A. 240, 136 Fed. 396.

The deed here in question was valid, and its earlier record as against no person was required by the laws of this state,—the laws which here govern. *Comp. Laws 1913, § 5594; Ildvedsen v. First State Bank*, 24 N. D. 227, 139 N. W. 105; *Telford v. Hendrickson*, 120 Minn. 427, 139 N. W. 941.

Where a preference under the bankruptcy law is claimed, the burden of proof is upon the plaintiff to establish such preference. *Re Chappell*, 113 Fed. 545; *Benjamin v. Chandler*, 142 Fed. 217; *Tumlin v. Bryan*, 21 L.R.A.(N.S.)960, 91 C. C. A. 200, 165 Fed. 166.

No presumption arises from the adjudication in bankruptcy that the bankrupt was insolvent for four months, or for any period, before his petition was filed, and hence it is incumbent on the trustee to prove the insolvency. *Re Chappell, supra; Collier, Bankr. 3d ed. 46.*

If, at the time the deed was given and delivered, it was not intended by either party as a preference, a failure to record it until such a time as the maker becomes insolvent would not make it a preference. *Brad-*

ley, C. & Co. v. Benson, 93 Minn. 91, 100 N. W. 670; Halbert v. Pranke, 91 Minn. 204, 97 N. W. 976; Dean v. Plane, 195 Ill. 495, 63 N. E. 274; Re New York Economical Printing Co. 49 C. C. A. 133, 110 Fed. 514; Re Thompson, 122 Fed. 174; Re Antigo Screen Door Co. 59 C. C. A. 248, 123 Fed. 249; Seager v. Lamm, 95 Minn. 325, 104 N. W. 1; Loeser v. Savings Deposit Bank & T. Co. 18 L.R.A. (N.S.) 1234, note; Loveland, Bankr. 3d ed. § 203a, p. 622.

A judgment, to be upheld, must be supported by a sufficient pleading. Satterlund v. Beal, 12 N. D. 122, 95 N. W. 518; 23 Cyc. 816; 38 Cyc. 1970; Fifer v. Fifer, 13 N. D. 28, 99 N. W. 763.

Where one seeks to set aside a deed for fraud, his proof must be clear and convincing. The burden here is on plaintiff. Englert v. Dale, 25 N. D. 587, 142 N. W. 169; McKillip v. Farmers' State Bank, 29 N. D. 544, 151 N. W. 287.

The fact that the parties to the deed are relatives raises no presumption of fraud. Fluegel v. Henschel, 7 N. D. 276, 66 Am. St. Rep. 642, 74 N. W. 996.

The fact that a grantor is insolvent nearly five months after the date of his deed, is no evidence of insolvency at the date thereof. Re Chap-pell, 113 Fed. 545; 20 Cyc. 458; Kain v. Larkin, 131 N. Y. 300, 30 N. E. 105; Hyde v. Chapman, 33 Wis. 391; Bishop v. State, 83 Ind. 67; Nevers v. Hack, 138 Ind. 260, 46 Am. St. Rep. 380, 37 N. E. 791; Greer v. Richardson Drug Co. 1 Tex. Civ. App. 634, 20 S. W. 1127; Windhaus v. Bootz, 92 Cal. 617, 28 Pac. 557; Fluegel v. Henschel, 7 N. D. 276, 66 Am. St. Rep. 642, 74 N. W. 996.

Insolvency must exist at the time of the transfer. Greer v. Richardson Drug Co. 1 Tex. Civ. App. 634, 20 S. W. 1127; Kain v. Larkin, 131 N. Y. 300, 30 N. E. 105; Sherman v. Hogland, 54 Ind. 579; Windhaus v. Bootz, 92 Cal. 617, 28 Pac. 557; McCole v. Loehr, 79 Ind. 432; Whitesel v. Hiney, 62 Ind. 168.

Without regard to the time of the occurrence of two transactions, if they are shown to be independent, distinct, substantive transactions, the fraud of the one cannot be visited on the other, shown to be free from fraud. Nelms v. Steiner Bros. 113 Ala. 562, 22 So. 435; Kock v. Bostwick, 113 Mich. 302, 71 N. W. 473; Muir v. Miller, 103 Iowa, 127, 72 N. W. 409; Kickbusch v. Corwith, 108 Wis. 634, 85 N. W.

149; *McKillip v. Farmers' State Bank*, 29 N. D. 541, 151 N. W. 287; 20 Cyc. 413.

Conveyances such as the one shown by the record here to have been are universally upheld by the courts. *McKillip v. Farmers' State Bank*, 29 N. D. 544, 151 N. W. 287.

BRUCE, J. (after stating the facts as above). The main question for determination in this case is whether the proof shows an unlawful preference under § 60a of the national bankruptcy act, and, as incident thereto, whether a deed which is executed more than four months prior to the filing of a petition in bankruptcy but which is not recorded until a date which comes within such four months' period, is an unlawful preference under the provisions of § 60a of the national bankruptcy act.

In the case at bar the deed was dated and delivered on April 6, 1908, but was not recorded until July, 1908. The adjudication in bankruptcy was on August 2, 1908, and this date was some four months after the date of the delivery and execution of the deed but less than four months after the time of the recording of the instrument.

Section 60a of the national bankruptcy act reads as follows: "A person shall be deemed to have given a preference if, being insolvent, he has, within four months before the filing of the petition, or after the filing of the petition and before the adjudication, procured or suffered a judgment to be entered against himself in favor of any person, or made a transfer of any of his property, and the effect of the enforcement of such judgment, or transfer, will be to enable anyone of his creditors to obtain a greater percentage of his debt than any other of such creditors of the same class. Where the preference consists in a transfer, such period of four months shall not expire until four months after the *date of the recording or registering* of the transfer, *if by law such recording or registering is required.*" [32 Stat. at L. 799, chap. 487, Comp. Stat. 1913, § 9644.]

There is some conflict in the authorities as to whether the period of four months begins to run at the time of the actual recording in cases where, though the grantee has not recorded his deed, he has nevertheless entered into open, notorious, and hostile possession of the premises, so that the creditors of the estate and the public generally have adequate

notice of his occupancy. Compare *Re Hunt*, 139 Fed. 283; *Re Chadwick*, 140 Fed. 674; *Meyer Bros. Drug Co. v. Pipkin Drug Co.* 69 C. C. A. 240, 136 Fed. 396, with *Benner v. Scandinavian-American Bank*, 73 Wash. 488, 131 Pac. 1149, Ann. Cas. 1914D, 702; *Telford v. Hendrickson*, 120 Minn. 427, 139 N. W. 941. It is not necessary, however, for us to pass upon this question, and we prefer not to do so, as it is one which must ultimately be determined by the Federal courts. It is sufficient to say that, even though we hold that the running of the four months' period is not required by the statute in all cases to begin with the recording of the instrument, and that, if due notice is given of the conveyance, such recording is not necessary, we must nevertheless hold that the giving of the notice must be clearly established, and that the burden of proof of showing the same is on the grantee, who seeks to take advantage thereof. If such notice is based upon the theory of the possession of the grantee under the deed, such possession must be open, notorious, and hostile. There is no such proof in the case at bar. All that we find in the record on the subject is the testimony of the witness Kitsie G. Burdick, who, in answer to the leading question, "She has been in possession of that land ever since?"—answered, "Yes, sir," and the testimony of the defendant, Jessie James, the grantee of the deed, who testified as follows: "Q. You farmed the land in 1908? A. Which land? Q. This 520 acres that is in question in this lawsuit? A. A part of it. Q. Who farmed the rest of it? A. I guess August Piper had part of it." This evidence falls far short of showing an open, notorious, and hostile possession, and it is to be noticed that to all of these questions counsel for the defendant strenuously objected, in place of opening up the question and doing all that he could to show the nature of the possession. The evidence shows clearly that the land was situated in different tracts and some distance from the home of the defendant, Jessie James, and there is no evidence whatever of any open and notorious possession thereof which would be notice to the world at large.

"The words 'open and notorious possession' as applied to the adverse holding of land by another, mean that the disseisor's claim of ownership must be evidenced by such acts and conduct as are sufficient to put a man of ordinary prudence on notice of the fact that the land in

question is held by the claimant as his own. The mere possession of the land is not enough for this purpose. An adverse possession entirely excludes the idea of a holding under the true owner. It is the knowledge, either actual or imputable, of the possession of his lands by another, claiming to own them bona fide and openly, that affects the legal owner thereof" (see 1 R. C. L. 700); and the same measure of proof of notice of possession which is necessary to acquire title by adverse occupancy as against the original owner should, in our opinion and in the case of an unrecorded deed, be required of the grantee to avoid the provisions of the bankruptcy act as against the trustee in bankruptcy and the creditors of the bankrupt. A distinction, too, must be made between acts of possession which would be notice to the owner of property and those which would be notice to the world at large or to the creditors of a bankrupt estate.

Constructive notice has been defined in § 7290 of the Compiled Laws of 1913, which reads as follows: "Every person who has actual notice of circumstances sufficient to put a prudent man upon inquiry as to a particular fact and who omits to make such inquiry with reasonable diligence is deemed to have constructive notice of the fact itself." Although it may be true that the owner of land which is lying at some distance from his residence might be deemed to have constructive notice of the claims and occupancy of a third person who has plowed or cultivated such land, and this from the very fact of seeing the land after cultivation and knowing that he himself has not done the work, yet we can hardly hold that this would be true of a third party or of a creditor, especially in a state like North Dakota where large areas of land are cultivated, through agents, by nonresidents, and by merely putting teams upon them in the springtime and in the fall, and without any tenancy or occupancy whatever being involved. Section 5594 of the Compiled Laws of 1913, being § 5038 of the Revised Codes of 1905, amends § 3594 of the Revised Codes of 1899, § 671, Civil Code 1877, and places attachment creditors in the same position as good-faith purchasers, so that the recording of the deed is as necessary to cut off their rights as it is to cut off those of the latter, and in this respect the statute overthrows the ruling of this court in *Leonard v. Fleming*, 13 N. D. 629, 102 N. W. 308, in which it was held that "a purchaser of real estate at

a sheriff's sale under attachment proceedings acquires no title as against a deed delivered before the levy of the attachment, but recorded after the attachment and before the judgment." *Mott v. Holbrook*, 28 N. D. 251, 148 N. W. 1061. It is perfectly clear to us, therefore, that although the bankruptcy act may possibly not require recording as an absolute prerequisite to the validity of a deed as against a creditor, where such creditor has actual or constructive notice of the execution and delivery of the same, and on this point we express no opinion, it does require that such recording shall be necessary in all cases where it would have been necessary to cut off the rights of a subsequent purchaser or of an attachment creditor. Under the holdings of this court an unrecorded deed is of no value against a purchaser or attachment creditor who purchases or levies in good faith and without knowledge, actual or constructive, of a prior deed; and, as we have before said, the record in this case does not show any possession on the part of the defendant which would amount to constructive notice to such persons nor any actual notice to them of the real facts in the case. The deed, therefore, is entirely inoperative as far as the trustee in bankruptcy is concerned.

Such being the case, it is not necessary for us to determine whether the evidence in this case justifies a holding that the transfer was in fraud of the rights of creditors under the laws of North Dakota. It is well, however, to say that the court is unanimous in the opinion that the subsequent transfer to Aaker was in fraud of creditors, and to also add that, in the opinion of the majority of the court, though not in the opinion of the writer of this opinion, the evidence is such as to warrant the holding that the transfers of the 520 acres of land to the defendant and of the 240 acres of land to Aaker were part of the same fraudulent scheme, and that fraud was at the base of and invalidated both transfers.

The judgment of the District Court is therefore reversed, with directions to the trial court to enter a judgment adjudging to be null and void the conveyances of the said 520 acres of land to the said Jessie James, and quieting the title in the plaintiff as against the claims of the said defendant, Jessie James, and awarding the possession of the said prem-

ises to the said trustee. The costs and disbursements of this appeal will also be taxed against the defendant and respondent.

On Petition for Rehearing.

BRUCE, J. Counsel for respondent files a petition for a rehearing in this case on which he asserts that this court has in its principal opinion entirely overlooked the second and third points:

"Second. That the appellant did not prove (a) that the grantor was insolvent at the time the transfer was made, or (b) that the grantee had reasonable cause to believe it was intended to give a preference.

"Third. That the question of a preference was not within the issues presented by the pleadings, nor a theory on which the case was tried in the district court."

He also states that the court overlooked this point:

"That plaintiff is not entitled to recover in such action as this, unless he proves that claims of creditors have been filed and allowed in the bankruptcy proceedings, and that the assets of the bankrupt estate, outside of the property alleged to have been fraudulently conveyed, is insufficient to pay such claims. We submit (he says) that there is no evidence in this case of any claim proved or allowed in the bankruptcy case of Kitsie G. Burdick; nor as to the assets of the estate, unless the schedules in bankruptcy, exhibit 1, are held to be competent evidence in this case, a question before referred to."

In conclusion he says: "The record discloses that the satisfaction of the debt due the defendant was not the only consideration, one part of the consideration being the assumption of mortgages of considerable amount. In case the defendant has paid any of these mortgages, it would seem that she should be duly protected. It would also seem clear that if the value of the land is more than enough to satisfy in full all claims against the bankrupt estate, which appears quite probable, the residue should belong to Jessie James, and not to Kitsie G. Burdick, on the ground that the conveyance was valid as between the parties, and the trustee's rights are limited to the satisfaction of the bankrupt estate. If the transfer were in fact both intended as a preference and to defraud creditors of the grantor, still the grantor clearly could not have suc-

ceeded, by action in her own name, to have the property restored to her. The order of this court would do that indirectly, provided there is a surplus value in the land above the needs of the claims against the bankrupt estate."

The order referred to was that the district judge "enter a judgment adjudging to be null and void the conveyances of the said 520 acres of land to the said Jessie James, and quieting the title in the plaintiff as against the defendant, Jessie James."

The majority of this court, as stated in the principal opinion, are of the opinion that the evidence is such as to warrant the holding that the transfers of the 520 acres of land to the defendant and of the 240 acres of land to Aaker, and the giving of the mortgage to the defendant on the latter property, are part of the same fraudulent scheme, and that fraud was at the basis of and invalidated both transfers. They hold, in short, that the allegation of the plaintiff is sustained which states that "said conveyance . . . [in fact, both conveyances were] executed by the said Kitsie G. Burdick without consideration and with intent to hinder, delay, and defraud the creditors of the said Kitsie G. Burdick, . . . and that the defendant, Jessie James, accepted and received said deed and conveyance of all of said property of said Kitsie G. Burdick, with knowledge of said fraudulent intent on the part of the said Kitsie G. Burdick and with intent on her part to assist the said Kitsie G. Burdick in her said fraudulent purpose, and to hold said lands and other property as a secret trust for said Kitsie G. Burdick."

Such being the holding of the majority of this court, it is immaterial whether at the time of the conveyance of the 520 acres of land now in question to the said Jessie James the said Kitsie G. Burdick was insolvent or not. The schedules in bankruptcy which were signed by Kitsie G. Burdick disclosed that she had eight unsecured creditors with an aggregate of \$649.10 of claims, and that these debts were contracted between the years of 1904 and 1908; the largest single item being \$260 contracted in 1905, and the next largest item being \$217 for money contracted in 1908. On the 6th day of April, 1908, Kitsie G. Burdick was the owner of 760 acres of land, which was encumbered for the aggregate sum of \$4,800, and the value of which was stated in

such schedules at the aggregate sum of \$14,700. The majority of this court holds that these equities, and which alone could have satisfied the unsecured debts, though conveyed in two separate deeds, were conveyed as a part of the one and the same transaction, and with the same fraudulent intent, and for the purpose of hindering, delaying, and defrauding the unsecured creditors. If this was the case, and the majority of this court holds it to be the case, the fact of the actual insolvency of the said Kitsie G. Burdick at the time of the first conveyance is not material.

It is true that the schedules in bankruptcy were the only specific evidence of the indebtedness of the said Kitsie G. Burdick, and that the admission of the schedules was objected to as being "incompetent, irrelevant, and immaterial, and as having nothing to do with the issues in this case." These schedules, however, were, under the pleadings and issues in the case, competent, relevant, and material.

The answer specifically admitted the first paragraph of the complaint. That paragraph alleged that "on the 22d day of August, 1908, one Kitsie G. Burdick, of Graham Island, Benson county, North Dakota, duly filed a petition in the United States District Court for the district of North Dakota, praying that she be adjudged a bankrupt pursuant to the act of Congress, and that pursuant to such petition the said Kitsie G. Burdick was by said court on said date duly adjudged a bankrupt," etc. No matter what may be the holdings of the cases where no adjudication in bankruptcy has been had, the cases, so far as we can learn, are practically unanimous that where such adjudication has been had and bankruptcy has been determined, that the schedules in bankruptcy are competent evidence of the bankrupt, both as against those holding under an unlawful preference and those holding by fraudulent conveyances. See *Hackney v. Hargreaves Bros.* 68 Neb. 624, 99 N. W. 675, 13 Am. Bankr. Rep. 164; *Re Docker-Foster Co.* 123 Fed. 190, 10 Am. Bankr. Rep. 584; *Bank of State v. Southern Nat. Bank*, 170 N. Y. 1, 62 N. E. 677; *Utah Asso. v. Boyle Furniture Co.* 39 Utah, 518, 119 Pac. 800, 26 Am. Bankr. Rep. 867.

Bankruptcy, however, or insolvency at the time of the conveyance, was not necessary to be shown in order to prove the transfer fraudulent and made for the purpose of hindering and delaying the creditors; and

as we understand our statute, provided there is fraud and an intent to hinder and delay the creditors, and such fraud and intention is known to the grantee, the transfer may be set aside, even if there is no actual insolvency at the time of its making. Section 6637 of the Revised Codes of 1905, § 7220 of the Compiled Laws of 1913, reads: "Every transfer of property or charge thereon made, every obligation incurred and every judicial proceeding taken with intent to delay or defraud any creditor or other person of his demands is void against all creditors of the debtor and their successors in interest and against any persons upon whom the estate of the debtor devolves in trust for the benefit of others than the debtor."

Nor as long as there are creditors is insolvency at the time of the making of the instrument necessary to the setting aside of a fraudulent transfer, even under the Federal Bankruptcy act. "The trustee," says the Federal act, "may avoid any transfer by the bankrupt of his property which any creditor of such bankrupt might have avoided, and may recover the property so transferred, or its value, from the person to whom it was transferred, unless he was a bona fide holder for value prior to the date of the adjudication." [30 Stat. at L. 566, chap. 541, § 70e, Comp. Stat. 1913, § 9654.] In construing this act, the court, in the case of *Bush v. Export Storage Co.* 136 Fed. 918, said: "Transfers which are deemed fraudulent in bankruptcy, and so declared by the bankruptcy act itself, are, first, conveyances and transfers by which a creditor obtains a preference of his claim over other creditors; second, conveyances which are intended to hinder and delay or defraud creditors; and, third, . . . transfers void as to creditors under the local law of the several states; but these transfers are prohibited, and authority vested in the trustee to set them aside, only when made within the four months' limitation. But besides this class of transfers made void by the bankruptcy act itself, as being against its policy of equal and fair distribution, the bankruptcy law (§ 70a, subsec. 4, 30 Stat. at L. 566, chap. 541) provides that the trustee shall be vested by operation of law with any property transferred by the bankrupt in fraud of his creditors, the precise language of the act being, 'transferred by him in fraud of his creditors.' There is no four months' limitation on this class of transfers, and this provision includes fraudulent conveyances

which are so by the common law, by statute law, and by any other recognized rule of law of the state." See also Loveland, Bankr. 2d ed. § 158; *Re Scrinopskie*, 10 Am. Bankr. Rep. 221.

Nor do we believe that there is any basic merit in counsel's objection to the language used by this court in its former opinion, in which it directed the trial court to enter judgment adjudging to be null and void the conveyance of the said 520 acres of land to the said Jessie James, and quieting the title in the plaintiff as against the claims of the said defendant, Jessie James, and awarding the possession of the said premises to the said trustee. The title, however, will, of course, be quieted and the possession rendered to the trustee merely for the purposes of the trust. The title of the trustee is and will be that of a trustee for the creditors and parties interested in the estate after the debts are paid. After the said debts are paid the remainder will be turned over to whomsoever it belongs, whether that remainder be real estate or personal property. These matters, however, are for the bankruptcy court to determine. All that we have to do is to give the trustee complete control of the property for the purposes of his trust.

"By subdivision 4," says Collier on Bankruptcy, 10th ed. on p. 1002, "property transferred by the bankrupt in fraud of his creditors passes to his trustee. This is the converse of the doctrine that trustees take title subject to equities; they also take title to property which the bankrupt has fraudulently transferred and in which, therefore, the creditors have equities. The trustee's interest in such property is stronger than was that of the creditors in whose stead he stands, *for he has a title*. The trustee is vested, not only with the title of the property, but also with the creditors' rights of action with respect to property of the bankrupt fraudulently transferred or encumbered by him, and he may assail in their behalf all of such transfers and encumbrances to the same extent as though the debtor had not been declared a bankrupt. . . . It is apparent that this provision applies to all property transferred by the bankrupt at any time in fraud of his creditors."

The petition for a rehearing is denied.

W. M. ROHAN v. MRS. MARTHA JOHNSON.

(L.R.A. —, —, 156 N. W. 936.)

Layman — good-faith agreement by — to collect compromise or settle — promissory note — percentage compensation — champerty — public policy — validity.

A good-faith agreement by a layman to collect, compromise, or settle a promissory note in consideration of a certain percentage of the amount collected or recovered, is not *per se* void on the ground of champerty or public policy.

Opinion filed February 23, 1916.

Appeal from the County Court of Cass County, *Hanson, J.*

From an order overruling a demurrer to the complaint, defendant .
appeals.

Affirmed.

Pollock & Pollock, for appellant.

Champerty is a species of maintenance, and is defined as being a bargain with a plaintiff or defendant *campum partire* to divide the land or other matter sued for between them if they succeeded, whereupon the champertor is to carry on suit for party at his own expense. 3 Bl. Com. 135; 1 Bouvier's Law Dict.

It consists of an agreement to prosecute or defend a suit, by personal services or the furnishing of funds, in which suit he has no personal interest, upon a corrupt agreement to divide the subject-matter. Abbott's Law Dict. title Champerty; *Huber v. Johnson*, 68 Minn. 74, 64 Am. St. Rep. 456, 70 N. W. 806; *Gammons v. Johnson*, 76 Minn. 76, 78 N. W. 1035; *Woods v. Walsh*, 7 N. D. 384, 75 N. W. 767; Comp. Laws 1913, § 9414; N. Y. Penal Code, §§ 136-141; *Lyon v. Hussey*, 82 Hun, 15, 31 N. Y. Supp. 281; Rev. Stat. (Wis.) 1858, § 62, chap. 165; *Miller v. Larson*, 19 Wis. 463; *Barker v. Barker*, 14 Wis. 132; *Underwood v. Riley*, 19 Wis. 412.

Public policy and the higher ethical standard of the profession of law do not permit the enforcement of such an agreement. *Huber v.*

NOTE.—On champertous contracts of laymen, see note in 14 L.R.A. 745. As to validity of champertous contract generally, see note in 12 L.R.A.(N.S.) 606.

Johnson, 68 Minn. 74, 64 Am. St. Rep. 456, 70 N. W. 806; Gammons v. Johnson, 76 Minn. 76, 78 N. W. 1035; Hamilton v. Gray, 67 Vt. 233, 31 Atl. 315; Byrd v. Odem, 9 Ala. 755; Wheeler v. Pounds, 24 Ala. 472; Coquillard v. Bearss, 21 Ind. 479, 83 Am. Dec. 362; Swans-
ton v. Morning Star Min. Co. 13 Fed. 215; Lathrop v. Amherst Bank,
9 Met. 489; Williams v. Fowle, 132 Mass. 385; Belding v. Smythe,
138 Mass. 530; Lancy v. Havender, 146 Mass. 615, 16 N. E. 464;
Thurston v. Percival, 1 Pick. 415; Weakly v. Hall, 13 Ohio, 167, 42
Am. Dec. 194; Phelps v. Manecke, 119 Mo. App. 139, 96 S. W. 221;
Re Evans, 22 Utah, 366, 53 L.R.A. 952, 83 Am. St. Rep. 794, 62
Pac. 913; 6 Cyc. Champerty, 864.

A complaint alleging a contract void for champerty is bad on de-
murrer. Coquillard v. Bearss, 21 Ind. 479, 83 Am. Dec. 362; Lyon
v. Hussey, 82 Hun, 15, 31 N. Y. Supp. 281; Huber v. Johnson, 68
Minn. 74, 64 Am. St. Rep. 456, 70 N. W. 806.

Lawrence & Murphy, for respondent.

Champerty is the officious interference in a suit, not in any way
belonging to anyone, by maintaining or assisting either party with
money or otherwise to prosecute or defend. But these harsh terms
have been greatly modified and softened in all jurisdictions. Manning
v. Sprague, 148 Mass. 18, 1 L.R.A. 516, 12 Am. St. Rep. 508, 18
N. E. 673; Gilman v. Jones, 87 Ala. 691, 4 L.R.A. 113, 5 So. 785, 7
So. 48.

The reason for the enforcement of the strict rule, in the earlier his-
tory, was because of the power of great men, to whom rights of action
were transferred in order to obtain support and favor in suits brought
to assert these rights, confederacies which resulted in oppression. Sly-
wright v. Page, Leon. pt. 1, p. 167; 4 Bl. Com. 135; Master v. Miller,
4 T. R. 320; Knight v. Bowyer, 2 De G. & J. 421, 27 L. J. Ch. N. S.
520, 4 Jur. N. S. 569, 6 Week. Rep. 565; Coondoo v. Mookerjee, L. R.
2 App. Cas. 186.

But, in this country, the reason for the ancient doctrine of champerty
and maintenance does not exist, and hence has not found favor in the
United States. Roberts v. Cooper, 20 How. 467, 15 L. ed. 969;
Thalhimer v. Brickerhoff, 3 Cow. 623, 15 Am. Dec. 309; Mathewson
v. Fitch, 22 Cal. 86; Bentinck v. Franklin & G. City Co. 38 Tex. 458.

But here the contract which really comes within the mischief of the rule, public policy and the administration of justice still demand its recognition and application. *Lathrop v. Amherst Bank*, 9 Met. 489; *Gilbert v. Holmes*, 64 Ill. 548; *Barker v. Barker*, 14 Wis. 142; *Lafferty v. Jelley*, 22 Ind. 471; *Holloway v. Lowe*, 7 Port. (Ala.) 488; *Weakly v. Hall*, 13 Ohio, 167, 42 Am. Dec. 194; *Backus v. Byron*, 4 Mich. 535; *Thallhimer v. Brinkerhoff*, 15 Am. Dec. 319, note; *Dorwin v. Smith*, 35 Vt. 69; *Findon v. Parker*, 11 Mees. & W. 975, 12 L. J. Exch. N. S. 444, 7 Jur. 903; *Stanley v. Jones*, 7 Bing. 369, 6 Eng. Rul. Cas. 376.

The distinction which courts make is whether the transaction is merely the bona fide acquisition of an interest in the subject of litigation, or whether it is an unfair or improper transaction, conceived and carried on merely for the purpose of illegal gain, spoil, or speculation. *Gilbert v. Holmes*, 64 Ill. 548; *The Mohawk*, 8 Wall. 153, 19 L. ed. 406; *Boardman v. Thompson*, 25 Iowa, 487; *Brown v. Bigne*, 21 Or. 260, 14 L.R.A. 745, 28 Am. St. Rep. 752, 28 Pac. 11; 5 R. C. L. 271, 272, and list of cases.

There is nothing in the contract or transaction here before the court to even hint that it comes within the champertous class. It seems, however, to clearly appear that appellant is seeking to take advantage of her own wrong, and to invoke the doctrine of public policy, on the clearest principles of estoppel. The plaintiff here is a mere layman, and this fact of itself constitutes a vast distinction. *Champerty*, 19 Alb. L. J. 469; *Vimont v. Chicago & N. W. R. Co.* 69 Iowa, 296, 22 N. W. 906, 28 N. W. 612; *Gilman v. Jones*, 87 Ala. 691, 4 L.R.A. 113, 5 So. 785, 7 So. 48; *Holloway v. Lowe*, 7 Port. (Ala.) 488; *Byrd v. Odem*, 9 Ala. 755; *Coquillard v. Bearss*, 21 Ind. 479, 83 Am. Dec. 362; *Scobey v. Ross*, 13 Ind. 117; *Brown v. Beauchamp*, 5 T. B. Mon. 413, 17 Am. Dec. 81; *Bryant v. Hill*, 9 Dana, 67; *Cardwell v. Sprigg*, 7 Dana, 36; *Wilhite v. Roberts*, 4 Dana, 172; *Evans v. Bell*, 6 Dana, 479; *Thurston v. Percival*, 1 Pick. 415; *McMahan v. Bowe*, 114 Mass. 140, 19 Am. Rep. 321; *Arden v. Patterson*, 5 Johns. Ch. 44; *Thalimer v. Brinkerhoff*, 20 Johns. 386; *Slade v. Rhodes*, 22 N. C. (2 Dev. & B. Eq.) 24; *Weedon v. Wallace*, Meigs, 286; *Dorwin v. Smith*, 35 Vt. 69; *Martin v. Clarke*, 8 R. I. 389, 5 Am. Rep. 586; *Nicols v. Bunting*, 10

N. C. (3 Hawks) 86; *Martin v. Veeder*, 20 Wis. 467; *Martin v. Amos*, 35 N. C. (13 Ired. L.) 201; *Blaisdell v. Ahern*, 144 Mass. 393, 59 Am. Rep. 99, 11 N. E. 681; *Small v. Mott*, 22 Wend. 405; *Schomp v. Schenck*, 40 N. J. L. 195, 29 Am. Rep. 219; *Mathewson v. Fitch*, 22 Cal. 86; *Bentinck v. Franklin & G. City Co.* 38 Tex. 458; *Ballard v. Carr*, 48 Cal. 74; *Hoffman v. Vallejo*, 45 Cal. 564; *Manning v. Sprague*, 148 Mass. 18, 1 L.R.A. 516, 12 Am. St. Rep. 508, 18 N. E. 673; *Re Paschal (Texas v. White)* 10 Wall. 483, 19 L. ed. 992; *McPherson v. Cox*, 96 U. S. 404, 417, 24 L. ed. 746, 750; *Central R. & Bkg. Co. v. Pettus*, 113 U. S. 116, 28 L. ed. 915, 5 Sup. Ct. Rep. 387.

By the great weight of modern authority, contingent fees charged for professional services, dependent on the amount recovered, are not within the rules against champerty and maintenance. 5 R. C. L. 276; *Gilman v. Jones*, 87 Ala. 691, 4 L.R.A. 113, 5 So. 785, 7 So. 48; *Stanton v. Haskin*, 1 McArth. 558, 29 Am. Rep. 612; *Perry v. Dickens*, 105 Pa. 83, 51 Am. Rep. 181; *Notes to Bowman v. Phillips*, 13 Am. St. Rep. 299; *Shirk v. Neible*, 83 Am. St. Rep. 169; *Gargano v. Pope*, 100 Am. St. Rep. 577; *Lipscomb v. Adams*, 112 Am. St. Rep. 510; *British Cash & Parcel Conveyers v. Lamson Store Service* [1908] 1 K. B. 1006, 1 B. R. C. 159, 77 L. T. K. B. N. S. 649, 98 L. T. N. S. 875, 14 Ann. Cas. 554; *Gruber v. Baker*, 20 Nev. 453, 9 L.R.A. 302, 23 Pac. 858; *Bernstein v. Humes*, 60 Ala. 582, 31 Am. Rep. 52; *Gilman v. Jones*, 4 L.R.A. 113, and note, 87 Ala. 691, 5 So. 785, 7 So. 48; *Adye v. Hanna*, 47 Iowa, 264, 29 Am. Rep. 484; *Manning v. Sprague*, 148 Mass. 18, 1 L.R.A. 516, 12 Am. St. Rep. 508, 18 N. E. 673; *Huber v. Johnson*, 68 Minn. 74, 64 Am. St. Rep. 456, 70 N. W. 806; *Duke v. Harper*, 66 Mo. 51, 27 Am. Rep. 314; *Schomp v. Schenck*, 40 N. J. L. 195, 29 Am. Rep. 219; *Thalhimer v. Brinckerhoff*, 15 Am. Dec. 308, and note, 3 Cow. 623; *Irwin v. Curie*, 171 N. Y. 409, 58 L.R.A. 830, 64 N. E. 161; *Weakly v. Hall*, 13 Ohio, 167, 42 Am. Dec. 194; *Reece v. Kyle*, 49 Ohio St. 475, 16 L.R.A. 723, 31 N. E. 747; *Powers v. Van Dyke*, 27 Okla. 27, 36 L.R.A. (N.S.) 96, 111 Pac. 939; *Brown v. Bigne*, 21 Or. 260, 14 L.R.A. 745, 28 Am. St. Rep. 752, 28 Pac. 11; *Croco v. Oregon Short Line R. Co.* 18 Utah, 311, 44 L.R.A. 285, 54 Pac. 985.

Respondent is not an attorney, and did not buy a note, or any part

thereof, and was only interested in its collection as the agent of appellant. *Mathewson v. Fitch*, 22 Cal. 86; *Woods v. Walsh*, 7 N. D. 376, 75 N. W. 767.

A person may lawfully and in good faith employ a nonprofessional agent to aid him in collecting a claim or in the prosecution of a suit. 6 Cyc. 865; *Raymond v. McCleery*, 15 Ky. L. Rep. 269; *Bell v. Gregory*, 10 Ky. L. Rep. 636; *Joy v. Metcalf*, 161 Mass. 514, 37 N. E. 671; *Renshaw v. First Nat. Bank*, — Tenn. —, 63 S. W. 194.

Demurrer is not the proper remedy in such cases. Such objections must be specifically pleaded. *Brumback v. Ordham*, 1 Idaho, 709; *Allison v. Chicago & N. W. R. Co.* 42 Iowa, 274, 3 Am. Neg. Cas. 330; *Major v. Insurance Co. of N. A.* 112 Mo. App. 235, 86 S. W. 883; *Ball v. Royal Ins. Co.* 129 Mo. App. 34, 107 S. W. 1097; *Cooke v. Pool*, 25 S. C. 593.

CHRISTIANSON, J. This is an appeal from an order of the county court of Cass county overruling a general demurrer to plaintiff's complaint. The complaint, omitting the formal parts, is in words and figures as follows:

"I. That on the 25th day of November, 1911, one Martin E. Johnson executed and delivered to one Evan Johnson, his certain written promissory note, wherein and whereby he promised to pay to the order of said Evan Johnson on demand after date the sum of four hundred ninety-three (\$493) dollars.

"II. That thereafter said Evan Johnson died, and his estate was thereafter duly probated in the county court of Clay county, Minnesota, a court of record and of general jurisdiction, and having jurisdiction of the estate and property of said Evan Johnson, including the note hereinbefore mentioned and described.

"That thereafter said estate was duly administered, and upon final distribution thereof, and on the 27th day of April, 1914, the hereinbefore mentioned and described note was duly assigned, transferred, and set over to the said defendant, and that said note was thereupon delivered over to said defendant as her separate property.

"III. That on or about the 17th day of September, 1914, the defendant entered into a certain agreement with this plaintiff, wherein

and whereby said defendant promised and agreed that, in consideration of the agreement of said plaintiff to undertake the collection, or the compromise and settlement of the cause of action, represented by said note, against the said Martin E. Johnson, that said defendant promised and agreed with this plaintiff to pay or cause to be paid to said plaintiff one half of the amount recovered or collected upon said note by the compromise and settlement or otherwise.

"IV. That said defendant, in conformity with said agreement with plaintiff, thereupon delivered over said note to this plaintiff, and that plaintiff thereupon undertook the collection or compromise and settlement of said note against said Martin E. Johnson in pursuance of said agreement with said defendant, and employed attorneys who commenced an action against the said Martin E. Johnson in the above-entitled court to recover the amount of said note, said action having been commenced under date of September 24, 1914; that thereafter said Martin E. Johnson appeared by his attorneys, and while said action was pending and with full knowledge on the part of said defendant that said plaintiff had undertaken to collect said note by said action, the said defendant on the 10th day of October, 1914, attempted to effect a settlement with said Martin E. Johnson, and did receive and accept from said Martin E. Johnson the sum of two hundred fifty (\$250) dollars in compromise and settlement of said above-described note, without the knowledge or consent of this plaintiff, but after the said plaintiff had specifically advised the said defendant that said Martin E. Johnson had offered plaintiff's attorneys to settle said action by the payment of two hundred fifty (\$250) dollars, and which amount plaintiff had refused, and after the defendant had advised plaintiff to proceed with the collection of said note by said suit according to his best judgment, and had promised to abide by the action of said plaintiff, in refusing to compromise and settle said note for two hundred fifty (\$250) dollars, and to accept such compromise and settlement as such plaintiff saw fit to make with said Martin E. Johnson.

"Wherefore, plaintiff prays for judgment against the defendant in the sum of one hundred twenty-five (\$125) dollars, with interest from and since the 10th day of October, 1914, and for his costs and disburse-

ments herein." Appellant's sole contention is that plaintiff's cause of action is based upon an agreement which is champertous and void.

Under the laws of this state it is presumed "that a person is innocent of crime and wrong," and "that private transactions have been fair and regular." (Comp. Laws 1913, § 7936, subdivs. 1 and 19.) The presumption, therefore, is that the agreement was not champertous, and the complaint must be liberally construed in favor of the pleading, and upheld, unless it clearly appears on the face thereof that plaintiff's cause of action is *per se* champertous and void. (See *Weber v. Lewis*, 19 N. D. 473, 476, 34 L.R.A.(N.S.) 364, 126 N. W. 105; 4 Standard Enc. Pl. 968.) It is conceded that the agreement does not violate the express provisions of any statute relative to champerty, but it is contended that it is contrary to good morals, and therefore void.

The original reasons for the protest against champertous contracts no longer exist. (See discussion of this subject in *Greenleaf v. Minneapolis, St. P. & S. Ste. M. R. Co.* 30 N. D. 112, 125, L.R.A. —, —, 151 N. W. 879; *Browne v. Bigne*, 21 Or. 260, 14 L.R.A. 745, 28 Am. St. Rep. 752, 28 Pac. 11; *Gilman v. Jones*, 87 Ala. 691, 4 L.R.A. 113, 5 So. 785, 7 So. 48; 5 R. C. L. 271; 6 Cyc. 852 et seq.) As the peculiar conditions of society which gave rise to the doctrine do not exist in this country, the tendency of the courts is strongly in direction of relaxation of the common-law doctrine. The United States Supreme Court has held that attorneys may lawfully contract with their clients to prosecute claims against the United States, and receive as compensation therefor, conditioned upon their success, an agreed amount or percentage of the sum recovered. *Re Paschal (Texas v. White)* 10 Wall. 483, 19 L. ed. 992; *McPherson v. Cox*, 96 U. S. 404, 417, 24 L. ed. 746, 750; *Central R. & Bkg. Co. v. Pettus*, 113 U. S. 116, 28 L. ed. 915, 5 Sup. Ct. Rep. 387. And although an agreement for contingent fees for professional services may contain provisions rendering it invalid, in whole or in part, still the mere fact that the compensation for such professional services is fixed in a certain amount or percentage of the amount recovered, and conditioned upon the success of the litigation, does not render such agreement champertous. The propriety, and even necessity, of such agreements under modern conditions, have been recognized by both bench and bar, as well as by the people's lawmaking representatives,

and their validity is sustained by the great weight of modern authority. See *Greenleaf v. Minneapolis, St. P. & S. Ste. M. R. Co.* 30 N. D. 112, 127, L.R.A. —, —, 151 N. W. 879; 5 R. C. L. 276; *Woods v. Walsh*, 7 N. D. 376, 383, 75 N. W. 767; *British Cash & Parcel Conveyers v. Lamson Store Service* [1908] 1 K. B. 1006, 1 B. R. C. 159, 77 L. J. K. B. N. S. 649, 98 L. T. N. S. 875, 14 Ann. Cas. 554; *Gilman v. Jones*, 87 Ala. 691, 4 L.R.A. 113, 5 So. 785, 7 So. 48; *Stanton v. Haskin*, 1 McArth. 558, 29 Am. Rep. 612; *Perry v. Dickens*, 105 Pa. 83, 51 Am. Rep. 181. See also notes contained in 15 Am. Dec. 321; 13 Am. St. Rep. 299; 83 Am. St. Rep. 169; 100 Am. St. Rep. 577; and 112 Am. St. Rep. 510.

Appellant's counsel say in their brief: "The general purpose of the law against champerty and maintenance is to prevent intermeddlers from stirring up strife and vexatious and speculative litigation which would disturb the peace of society, lead to corrupt practices, and prevent remedial processes of the law." This seems to be a fair statement, so far as it goes, when applied to transactions of the kind involved herein.

No good purpose would be accomplished by quoting any of the numerous definitions of champerty found in the books. While the authorities differ as to all the ingredients essential to constitute champerty, they seem agreed that the gist of the offense is the malicious or officious intermeddling in a suit in which the intermeddler has no interest. 5 Am. & Eng. Enc. Law, 819; *Gilman v. Jones*, 87 Ala. 691, 4 L.R.A. 113, 5 So. 785, 7 So. 48; *Brown v. Bigne*, 21 Or. 260, 14 L.R.A. 745, 28 Am. St. Rep. 752, 28 Pac. 11.

In the case of *Woods v. Walsh*, 7 N. D. 376, 383, 75 N. W. 767, this court discussed, but did not decide, the question of whether an agreement on the part of an attorney to prosecute an action at his own expense for a certain percentage of the amount recovered was champertous. The court said: "It is true that champertous agreements have been held obnoxious from a very early period in the history of the common law. The statute in this state has singled out certain agreements which were champertous at common law, and declared that the same are misdemeanors. See Revised Codes, §§ 7008-7013. The case at bar reveals no features which bring it within either of the sections we have cited. There is no pretense that the plaintiff in the action has ever sold or at-

tempted to sell the claim in suit—*i. e.*, two promissory notes—to his attorneys. Much less is it claimed that any transfer of the notes has ever been made to plaintiff's attorneys, or agreed to be made to them. Put in its strongest terms, the affidavits filed in defendants' behalf show that plaintiff agreed with one of his attorneys to pay the attorney one half of the amount which should be recovered in the action, on condition that the attorney would take up and prosecute the case at the attorney's own cost and expense. We question whether such an agreement is champertous in this state. It certainly is not an act which the statute of this state punishes as a misdemeanor. We think that, under the laws of this state, an attorney may lawfully contract for a contingent fee to be measured by the amount recovered by an action. Rev. Codes, § 5574. To purchase a claim for the purpose of suing the same is a misdemeanor in an attorney under the statute. Id. § 7008. But there is a line of separation between the purchase of a claim for the express purpose of suing the same, and a mere agreement for compensation, such as is claimed existed here."

In considering a somewhat similar question in *Brown v. Bigne*, 21 Or. 260, 14 L.R.A. 745, 28 Am. St. Rep. 752, 28 Pac. 11, the supreme court of Oregon said: "The gist of the offense consists in the officious intermeddling in another suit, and contracts not within the mischief to be guarded against should not be held to come within the rule. . . . The purchase of a right, which is the subject-matter of a pending lawsuit by one standing in no fiduciary relation, is not unlawful, unless it be made for the mere purpose or desire of perpetuating strife and litigation; nor can it make any difference, on principle or authority, that the consideration for the purchase is to be used in conducting the litigation and paying the expenses thereof. A fair bona fide agreement, by a layman, to supply funds to carry on a pending suit, in consideration of having a share in the property if recovered, it seems to us, ought not to be regarded as *per se* void either on the grounds of champerty, as now understood, or of public policy. Indeed, it may sometimes be in furtherance of justice and right that a suitor who has a just title to property, and no means except the property itself, should be assisted in that way. The doctrine of champerty is directed against speculation in lawsuits, and to repress the gambling propensity of buying up doubtful claims.

It is not and never was intended to prevent persons from charging the subject-matter of the suit in order to obtain the means of prosecuting it. 1 Addison, Contr. 392; Stotsenburg v. Marks, 79 Ind. 193. But agreements of the kind above suggested should be carefully watched and closely scrutinized, when called in question, and if found to have been made, not with a bona fide object of assisting a claim believed to be just, but for the purpose of injuring and oppressing others by aiding in unrighteous suits, or for the purpose of gambling in litigation, or to be so extortionate or unconscionable as to be inequitable against the party, effect ought not to be given to them. Courts administering justice according to the broad principles of equity and good conscience, as they are bound to do, will consider whether the transaction is merely the bona fide acquisition of an interest in the subject of litigation, or whether it is an unfair or illegitimate transaction, gotten up for the purpose merely of spoil or speculation. The doctrine of champerty, to the extent that furnishing aid in a suit under an agreement to divide the thing recovered is *per se* void, we think ought not to prevail, when such aid is furnished by a layman; but when such contracts are made for the purpose of stirring up strife and litigation, harassing others, inducing suits to be begun which otherwise would not be commenced, or for speculation, they come within the analogy and principles of that doctrine, and should not be enforced. Gilbert v. Holmes, 64 Ill. 548; The Mohawk, 8 Wall. 153, 19 L. ed. 406; Boardman v. Thompson, 25 Iowa, 487."

Appellant's counsel contends that the contract set forth in the complaint gave Rohan as agent exclusive power to settle or compromise the note, and hence prohibited the defendant from settling the action without the consent of Rohan. We do not believe the complaint is susceptible of this construction. It seems to be a well-settled rule of law that an authorization to collect a claim does not confer upon the agent power to compromise or settle a claim. See 31 Cyc. 1373; 3 Am. & Eng. Enc. Law, 358. And the complaint merely alleges that plaintiff was given such authority. There is nothing in the complaint to indicate that any restriction was placed on defendant's right to settle her cause of action. The action was commenced in her name, and upon her authorization, and she made settlement thereof. Plaintiff does not

seek to set aside or defeat the settlement made by defendant, but recognizes such settlement, and bases his demand herein, not upon the amount of the claim, but the amount of the settlement. Under the holding of this court in *Greenleaf v. Minneapolis, St. P. & S. Ste. M. R. Co.* 30 N. D. 112, 127, L.R.A. —, —, 151 N. W. 879, the whole contract is not rendered invalid by a clause prohibiting the client from settling the suit without the consent of the attorney, but such clause may be stricken from the contract, and the balance of it upheld.

The law recognizes the fact that the services of nonprofessional agents may be desirable or necessary in collecting or enforcing claims. (See 6 Cyc. 865.) Mercantile and commercial agencies are recognized establishments in, and collection agencies are by no means strangers to, the modern conditions of business and commerce, and the practice of collecting claims upon a commission or percentage basis of the amount collected is too well known to require elucidation. There is nothing on the face of the complaint to indicate that the plaintiff was guilty of officious intermeddling in a lawsuit, or that the contract was made for the purpose of stirring up strife or litigation, or to encourage the bringing of an action upon a doubtful claim, or for the purpose of injuring or oppressing anyone by the prosecution of an unrighteous suit upon a doubtful or speculative claim, or that plaintiff agreed to pay the cost and expense of litigation. Nor is there anything to show that litigation was contemplated at the time the agreement was made.

The agreement set forth in the complaint is merely to collect, compromise, or settle a promissory note in consideration of a certain percentage of the amount collected or recovered. Such agreement is not *per se* void either on the ground of champerty or public policy. The demurrer was properly overruled.

The order appealed from is affirmed.

ED. DRINKWATER, as Trustee of Cornelius R. Pake, Bankrupt,
in Bankruptcy, v. FRANCES E. PAKE and Cornelius R. Pake.

(156 N. W. 930.)

Referee — findings of fact — assailed for first time — in supreme court — trial court — objections to findings — there first presented.

1. The findings of fact of a referee cannot be assailed for the first time in the appellate court. But the party dissatisfied with such findings must, in the first instance, present his objections thereto by proper exceptions in the court below.

Personal property — vendor — sale — possession — control — immediate delivery — change of possession — fraudulent — creditors — good faith.

2. Under the provisions of § 7221, Compiled Laws, every sale made by a vendor of personal property in his possession or under his control, unless accompanied by an immediate delivery and followed by an actual and continued change of possession of the property sold, is presumed to be fraudulent and void as against creditors of the vendor, unless those claiming under the sale make it appear that the same was made in good faith and without any intent to hinder, delay or defraud such creditors.

Opinion filed February 28, 1916.

From a judgment of the District Court of Burke County, *Leighton, J.*, defendants appeal.

Affirmed.

Francis J. Murphy, for appellants.

There was a bona fide indebtedness by Cornelius R. Pake to his wife, Frances E. Pake, and he had a right to pay to his wife the amount of such indebtedness. She was his creditor, and it was to pay her that the transfer was made. The common law recognizes the right of the debtor to secure or pay one creditor in preference to another. Comp. Laws 1913, §§ 4654, 7218; *Cutter v. Pollock*, 4 N. D. 205, 25 L.R.A. 377, 50 Am. St. Rep. 644, 59 N. W. 1062; *Wannemacher v. Merrill*, 22 N. D. 46, 132 N. W. 412.

Creditors of a husband cannot complain of a payment made by him in good faith of an honest debt due his wife. *Kolbe v. Harrington*, 15 S. D. 263, 88 N. W. 572.

A conveyance by husband to his wife to secure a bona fide debt due

to her from him is not void as to creditors, although the husband's intent is fraudulent, unless the wife knew of such bad intent. *Williams v. Harris*, 4 S. D. 22, 46 Am. St. Rep. 753, 54 N. W. 926; *First State Bank v. O'Leary*, 13 S. D. 204, 83 N. W. 45; *Fluegel v. Henschel*, 7 N. D. 276, 66 Am. St. Rep. 642, 74 N. W. 996; *Wannemacher v. Merrill*, 22 N. D. 50, 132 N. W. 412; *Stevens v. Meyers*, 14 N. D. 398, 104 N. W. 529.

George H. Gjertson, E. R. Sinkler, and Wolfe & Schneller, for respondents.

Upon a sale of personal property there must be actual delivery, and immediate and continuous change of possession. Otherwise such sale is presumed to be fraudulent and void as to creditors of the vendor. *Comp. Laws 1913, §§ 7221, 7223.*

CHRISTIANSON, J. The plaintiff, Ed. Drinkwater, as trustee in bankruptcy of Cornelius R. Pake, bankrupt, brought this action to cancel a transfer of certain personal property from the defendant Cornelius R. Pake to his wife, the defendant Frances E. Pake, on the ground that such transfer was without consideration not accompanied by a change of possession, and was made with intent to hinder, delay, and defraud the creditors of the bankrupt, and is therefore null and void as to such creditors. By consent of the parties a reference was ordered,—the referee being empowered to try all issues and make findings of fact and conclusions of law. A trial was had before such referee, at which both sides produced witnesses and offered evidence. The referee made findings of fact and conclusions of law in favor of the plaintiff, and, subsequently, pursuant to notice, the referee's findings and conclusions were confirmed by the trial court and judgment entered in favor of the plaintiff. The defendants appealed from this judgment and demanded a trial *de novo* in this court.

Appellants' principal contention is that the following finding of fact is not supported by a preponderance of the evidence: "That said assignment and transfer of said property was made without a transfer of actual possession and without a manual delivery of said property. . . . That said transfer of property was without consideration, and was made with intent to hinder and delay and defraud the creditors

of the said Cornelius R. Pake." As already stated, the trial of all issues in this action was had before a referee. The record shows that the referee's findings and conclusions were confirmed pursuant to notice, and that both plaintiff and defendant were represented at such hearing. No exceptions were taken to the referee's findings or conclusions, nor was any objection made to the confirmation of the referee's report at the time of the hearing of the application to confirm such report.

Section 7654, Compiled Laws, provides: "All acts of and proceedings by a referee shall be deemed excepted to in the same manner and under the same conditions as though such proceedings had been before a district or county court; and in all trials before a referee in which such referee shall make findings of fact and conclusions of law, the prevailing party shall serve upon the other a copy of such findings and conclusions, after the same shall have been filed with the clerk of court, with a notice of the time of such filing, and either party may except to any such findings of fact or conclusions of law, by filing a written statement of such exceptions with the clerk within twenty days after the service of such copy of notice; and all such exceptions shall be incorporated in the statement of case which may thereafter be settled. When the findings of fact or conclusions of law of a referee are set aside or modified by the court, the action of the court in that regard shall be deemed excepted to."

This section clearly contemplates that a party who desires to assail a finding of fact or conclusion of law made by a referee must do so, in the first instance, by proper exceptions in the trial court. It is intended that the trial court should know what finding or conclusions (if any) are assailed, when passing upon the application to confirm the referee's report. If it is contended that the evidence is insufficient to support the findings, or any of them, this objection must be called to the trial court's consideration by proper exception. See *Illstad v. Anderson*, 2 N. D. 167, 49 N. W. 659; 34 Cyc. 858, 860, 866; 17 Enc. Pl. & Pr. 1065. As no exceptions were made to any of the findings of fact or conclusions of law of the referee, they cannot be assailed for the first time in this court. To hold otherwise would be to disregard the plain provision of the statute.

We will add, however, that we have examined the evidence contained in the record, and in our opinion the finding of the referee which is assailed as unsupported by the evidence is sustained thereby. The property transferred consisted of horses, cattle, and machinery belonging to the defendant Cornelius R. Pake. Prior to, at, and subsequent to the time of the transfer, the two defendants were living together as husband and wife upon a farm in Burke county, in this state. After the execution and delivery of the bill of sale, the defendant Cornelius R. Pake continued to use the property as before. It is true he claims that he did so as the agent for his wife, but nevertheless he was still permitted for all apparent purposes to possess and use the property as before. This condition rendered the sale presumptively fraudulent, and placed upon defendants the burden of showing that the sale was made in good faith, and without intent to hinder, delay, or defraud the creditors of Cornelius R. Pake. Comp. Laws, 1913, § 7221.

We are satisfied that the evidence in the case, taken as a whole, sustains the findings of fact made by the referee.

The judgment of the District Court is affirmed.

ANNA ERICKSON v. A. C. WIPER.

(157 N. W. 592.)

Complaint—attacked first—introduction of evidence—liberally construed—sustained when possible.

1. A complaint attacked by objection to the introduction of evidence will be liberally construed, and the pleading will be sustained if possible.

Statute of frauds—invoked on trial—must be—waived—supreme court.

2. The protection of the statute of frauds must be invoked in some appro-

NOTE.—The growth of the doctrine that the consideration clause in a deed is merely a receipt, and that parol evidence is admissible to explain the consideration for almost every purpose except to allow a grantee to avoid the deed where no fraud or mistake is shown, is set forth in notes in 20 L.R.A. 101, and 25 L.R.A.(N.S.) 1194, and the case of ERICKSON v. WIPER is in accord with the modern doctrine. For a further consideration of this subject, see note in 68 L.R.A. 298, referred to

33 N. D.—13.

prate manner in the trial court, and cannot be invoked for the first time in the appellate court.

Statute of frauds—contracts—full performance—no application—acceptance—unperformed part—payment of money.

3. The statute of frauds has no application where there has been a full and complete performance of the agreement by one of the contracting parties, and acceptance of such performance by the other party, and the part remaining to be performed is merely the payment of money.

Contemporaneous agreement—parol—written contract—inducing cause—consideration—evidence—admissible.

4. A parol contemporaneous agreement which constituted the inducing cause of a written contract, or formed a part of the consideration therefor, is generally admissible in evidence.

Receipt of money—acknowledgment of—clause in deed—not conclusive—explanation—by parol.

5. The clause in a deed acknowledging receipt of a certain sum of money as consideration therefor is not conclusive, but is open to explanation or contradiction by parol proof.

Estoppel by deed—defense of—must be pleaded—opportunity.

6. As a general rule the defense of estoppel by deed is not available unless pleaded, where the party seeking to assert such defense had an opportunity to plead it.

Equitable estoppel—by deed—in pais—parties—situation—change in—deed or statements—reliance on—loss probable.

7. An equitable estoppel by deed or *in pais* is not created or enforceable unless there has been a change in the situation of one of the parties in reliance on the deed or statements; and the party setting up the estoppel must show that he will be subjected to a loss if he cannot set up the estoppel.

Cross-examination—new matter—disclosed on—adverse party—may re-examine—as to such matter.

8. Where new matter is brought out on cross-examination of a witness, the adverse party is entitled to re-examine the witness regarding such new matter.

in the dissenting opinion on parol evidence to vary the consideration clause of a deed.

The necessity of pleading the statute of frauds is the subject of a comprehensive note in 49 L.R.A.(N.S.) 29, setting forth the rule in accord with *ERICKSON v. WIPER* that unless the statute of frauds is presented as a defense in the trial court that objection to the contract cannot be made for the first time on appeal.

See also notes in 86 Am. Dec. 684, and 78 Am. St. Rep. 650, on when and how the statute of frauds must be pleaded.

Error — assignments of — rulings — admission of evidence — based on — specific — direct.

9. Assignments of error based upon rulings in the admission and exclusion of testimony should be specific and point out the particular ruling or rulings complained of.

Evidence — testimony — admission of — rulings on — nonprejudicial.

10. Certain rulings in the admission and exclusion of testimony examined and held correct or nonprejudicial.

Witness — answers — irresponsive — striking out — error — like testimony — in record — cured.

11. The error, if any, in striking out an answer as irresponsive is cured where the witness elsewhere in his testimony has testified, or is permitted to testify, to the substance of the answer stricken.

Directed verdict — motion for — denial of.

12. It is *held*, for reasons stated in the opinion, that defendant's motion for a directed verdict was properly denied.

Error — party asserting — proof of — burden — record — must clearly appear from.

13. A party asserting error has the burden of proving it, and must present a record affirmatively showing such error.

Attorney's argument — error on — objectionable language — record must show.

14. A party predicating error on an attorney's argument to the jury must present a record affirmatively showing that objectionable language was used.

Nonsuit — directed verdict — motion for — trial court — grounds there urged — supreme court — will only consider — cannot be changed.

15. In reviewing a ruling on a motion for nonsuit or a directed verdict, the appellate court will consider only the grounds urged in the trial court, and appellant will not be permitted to change them or to add others in the appellate court.

Opinion filed March 6, 1916.

From a judgment of the District Court of Ward County, *Leighton, J.*, defendant appeals.

Affirmed.

Greenleaf, Bradford, & Nash, for appellant.

A contract for the sale of real property or *an interest therein* is invalid unless the same or some note or memorandum thereof is in

writing and subscribed by the party to be charged, or by his agent. Rev. Codes 1905, § 5332.

In the absence of fraud, mistake, or ambiguity, the accepted rule is that parol evidence is not admissible to vary or change the terms of a written instrument. Greenl. Ev. 15th ed. § 275.

E. R. Sinkler, for respondent.

The court in every stage of an action may disregard any error or defect in the pleadings, which shall not affect the substantial rights of the adverse party, and no judgment shall be reversed or affected by reason of such error or defect. Comp. Laws 1913, § 7485.

"Where an oral promise relating to the transfer of real property has been performed, the contract of which it is a part is no longer within the statute of frauds by reason of such promise, and accordingly an action will lie for a breach thereof. This is true of agreements to lease and to sell real property, or some interest therein." 22 Cyc. 293, and cases cited.

"If an agreement which was unenforceable because within the statute of frauds has been performed, an action will ordinarily lie for a refusal to perform a promise given in consideration thereof, or in connection therewith." 22 Cyc. 293, 294, and cases cited.

The consideration mentioned in the deed may be inquired into, or explained by parol. It, of itself, is not conclusive of the fact. *Martin v. White*, 115 Ga. 866, 42 S. E. 279; *Velton v. Carmack*, 20 L.R.A. 101, note; *Shehy v. Cunningham*, 25 L.R.A.(N.S.) 1194, and note, 81 Ohio St. 289, 90 N. E. 805; *Fowlkes v. Lea*, 68 L.R.A. 925, and note, 84 Miss. 509, 36 So. 1036, 2 Ann. Cas. 466.

Where there is substantial conflict in the evidence, a new trial will not be granted. *Becker v. Duncan*, 8 N. D. 600, 80 N. W. 762; *Muri v. White*, 8 N. D. 58, 76 N. W. 503.

CHRISTIANSON, J. On July 22, 1911, and for several years prior thereto, the plaintiff was living with her husband, John Erickson, upon the southeast quarter of section 23, township 161, range 90, in Burke county. This land adjoined the town site of Coteau. John Erickson was the record owner thereof, but it is undisputed that it was occupied

by him and his wife (the plaintiff), and their children as their home, and that the plaintiff had a homestead interest therein.

It is also undisputed that on July 22, 1911, John Erickson and the plaintiff herein, as his wife, executed and delivered to the defendant, Wiper, a warranty deed for this tract of land, subject to the encumbrances of record against the same. The controversy involved in this lawsuit relates to the circumstances and conditions under which the transfer was made, and the amount to be paid by Wiper, and the manner of such payment. Wiper testifies that on the 21st of July, 1911, he went to Erickson's farm to look after certain interests, and he gives the following version of a conversation had at that time: "They were very anxious to go to Canada. Mrs. Erickson was very anxious to have John go to Canada to get some land, because he was drinking so hard that she thought if he got away from old associates he might accomplish something in making a home for them. They wanted to sell me this particular piece of land, saying they owed so much on it, and there was a second crop failure staring them in the face, and unless they could get some money from me they did not know how they could get to Canada. They expected any time there would be a suit started, foreclosures and judgments rendered so they would be unable to get anything, and wanted me to buy the land, and they wanted \$5,000 for the land to start on. I told them I could not think of giving \$5,000 for the land. I would not consider it at all. Finally they asked me if I would consider it at \$4,500. I said 'No,' I would be willing to take the land at \$4,000, and give them the privilege of redeeming the land within a reasonable time at the same price at any time before the 1st of April, for at that time I would have to make some arrangements for the cropping of it. They decided to accept that offer. I told them they could think it over, and if they felt the same way to-morrow, Saturday, or any later date, they might come in and we would deal along those lines. . . ."

Wiper's testimony regarding this conversation was corroborated by his chauffeur, Heath; although Heath says that Mrs. Erickson while present took no part in the conversation, but that this was carried on by Wiper and Erickson. Heath further testified that he and Wiper first came to Erickson's farm, and found that Erickson was in town, and

that they thereupon drove to town and took Erickson with them in the automobile, and went to examine three different tracts of land that Erickson was cropping, in which Wiper or his bank were interested; that during all of this time no talk was had about the sale of the land by Erickson to Wiper, but that this was first mentioned when they came to the Erickson farm.

Mrs. Erickson admits that Wiper came to her home on the day in question, and that some talk was had, but she denies absolutely that any talk was had outlining terms of sale as testified to by Wiper. She claims that the terms of sale were first discussed in detail and agreed upon, on the following day (July 22, 1911), when she and her husband went to defendant's bank, made the sale, and executed and delivered the deed.

She testified in part as follows:

Q. When you were in on the 22d of July, where did you go to?

A. I went in to the room in the back part of the bank.

Q. Who was with you?

A. Nobody else, only Erickson and Wiper and me.

Q. Did you have any talk about the land at that time?

A. Yes.

Q. What talk did you have with him there in the bank at that time about the land?

A. John wanted to sell the land because he wanted to go to Canada, and I says I have signed enough, but if you want to go to Canada I will sign the land if there is anything left on the land, and Mr. Wiper said he would figure it, he said there was \$2,800, mortgage, and there was no more talk, and he wrote something on a piece of paper, but no more talking until I said I want to have something to say in that land, for that homestead belongs to me just as much as to him, and I have got the children to support, and if you go to Canada I cannot stay here with the children on nothing.

Q. What did he say?

A. He said you come in when the papers come back, and I will pay you all there is over the mortgage, and the land is \$5,000, and the mortgage was \$2,800.

Q. Who was present at the time that he told you this?

A. No one in there only Erickson, me, and Wiper.

Q. Do you know whether Wiper—where this paper was at the time you were in there?

A. Yes, that paper, you know they have a desk and that is kind of a shelf on both sides, and he pulled the paper out of there, and began to write something when we were talking, and he talked a little. Well, you understand now before I sign it I want to have read over what—he said \$2,800 mortgage, and I was supposed to have the rest, and the land is \$5,000.

Q. Did he agree to that?

A. Yes, he agreed to that.

Q. And then after he agreed to that did you sign the paper?

A. I did not sign any more than the deed.

Q. You signed the deed?

A. Yes.

Q. Was Wiper going to give him money to go to Canada?

A. Yes.

Q. How do you know that?

A. He told me and I heard it.

Q. Who told you?

A. My husband said to Wiper, all I want is \$150 and the rest goes to my wife.

Q. I thought you said it was all to go to you?

A. He wanted \$150 at this time.

Q. And the rest was to go to you?

A. Yes.

Wiper admits that John Erickson and his wife (the plaintiff), came to his bank on the day in question, and executed and delivered the deed. He also admits that some further talk was had regarding the terms of the deal, but denies flatly that he agreed to pay anything to the plaintiff.

Wiper testified in part:

I asked Mr. and Mrs. Erickson when they came in if they had anyone in town that they would care to call in, in the bank with them as a witness to that transaction, and they thought it was not necessary. This

was just before dinner. I says you better have somebody come in with you, Mrs. Erickson, you must know somebody in town and they decided Mr. Dahlquist was an old friend of the family, and they would ask Mr. Dahlquist to come in, and I said it is about dinner time and we have not had dinner, you go to dinner and I will go to dinner, and after dinner you come in and bring in Mr. Dahlquist or whoever you want in, in the bank. I should think about 2 o'clock in the afternoon we three met at the bank. We had not yet taken the deed, we had not yet drawn the deed. I asked him if Mr. Dahlquist was coming in, and they said they had been over to his house, but he was out in the country to his farm, and I think Mr. Erickson said we don't think it is necessary anyhow. We have done lots of business with you, and we always got along all right, and I finally said all right, *and then we entered into the talk about who was to have this money, whatever money might be had, might be due them if any, and it was agreed that this seed lien, these seed lien notes that I would have it to crop if any, and convert the proceeds into money, together with the \$4,000, that I would be allowing them for the land, would be the whole amount of their credit from it, all of their credit including indebtedness they owed us at that time outside of what was secured on the land, was to be deducted, together with the amount of money I advanced him from the total proceeds, and that the \$300 that was to be paid them was simply in the way of an advance, so John might go Canada and get some land.*

Wiper further testified that he wrote the deed himself, and that he also prepared the following written agreement embodying the terms on which the deal was made:

July 22, 1911.

On payment to me of the sum of four thousand dollars (\$4,000) less the then encumbrances, I agree to convey to John Erickson of Coteau, N. D., by quitclaim deed the S.E.¼ sec. 23-161-90, same being the amount I am taking said land over at to-day. I also agree to collect two promissory notes signed by John Erickson in favor of the First National Bank of Bowbells, one for \$650 and one for \$154.65, secured by seed lien on lands owned and rented by John Erickson, and to pay to John Erickson any and all money due him from such collection after

deducting amount necessary to pay me for advances necessary to make the land net me just \$4,000 after paying all taxes and past due interest and any and all advances made to you up to and including cash paid at this date. Also all bills which I have guaranteed for you up to this date, which is \$48 to Rogers Lumber Company.

(Signed) A. C. Wiper.

Wiper testified that this agreement was written by himself on the typewriter, and the original handed to Erickson, but that he made a letter-press copy thereof, and such copy was received in evidence. Mrs. Erickson denied that such agreement was made or such instrument delivered. She claimed that the sale to Wiper was unconditional, and that he agreed to pay \$5,000 for the land, \$150 of which should be paid to John Erickson, and the remainder (after deducting mortgages aggregating \$2,800) should be paid to her. The deed as already stated was prepared by Wiper himself. It recited a consideration of \$5,000, and was recorded in the office of the register of deeds of Burke county on the same day it was executed. Wiper claims that he paid Erickson \$100, and also paid up seed liens, interest, and taxes, which, together with the real estate mortgages assumed, would aggregate in all \$4,000 and over.

Erickson went to Canada, where he died on August 28, 1911. Plaintiff instituted this action in February, 1912. The same was afterwards tried to a jury, and resulted in a verdict in plaintiff's favor for \$1,553.01, with interest from July 22, 1911. The amount of the verdict was the difference between \$5,000, and the amount due July 22, 1911, on the real estate mortgages, including past-due interest and taxes. The jury therefore believed that the agreement was as testified to by the plaintiff. It is conceded that if plaintiff is entitled to recover at all, she is entitled to recover the amount found by the jury. No motion for new trial was made, but defendant has appealed from the judgment entered upon the verdict, specifying various errors, which will be considered in the order in which they are presented and argued in appellant's brief.

1. Appellant's first contention is that the complaint does not state a cause of action. This objection was not raised by demurrer, but was

raised for the first time after the commencement of the trial by an objection to the first question put to plaintiff's first witness. The question and objection were as follows:

"Q. What is your name?

"Defendant's attorney:—At this time the defendant objects to the question and also to the introduction of any testimony or evidence in behalf of the plaintiff in this action, on the ground and for the reason that the same is not admissible under the pleadings, that the complaint herein does not state a cause of action."

The plaintiff's complaint alleged that John Erickson on July 22, 1911, was the owner in fee simple of the real estate in question; that at that time and for several years prior thereto said John Erickson and plaintiff were husband and wife and resided on said land, and that the same was their homestead and claimed by plaintiff as such; that the same did not comprise more than 160 acres and was not worth more than \$5,000; that on or about July 22, 1911, "this plaintiff and said John Erickson and the defendant entered into an agreement wherein and whereby the said defendant promised and agreed to pay to this plaintiff the sum of \$5,000 for the release of her homestead interest in and to the lands above described; and it was expressly agreed by and between plaintiff, her husband, and the defendant that the full sum of \$5,000 should be paid to the plaintiff, and the defendant promised and agreed to pay said sum of five thousand dollars (\$5,000) to plaintiff, after deducting the amount of mortgages of record against said land, with the consent and at the request of said husband of plaintiff, and that at said time this plaintiff refused to sign the deed herein-after mentioned, unless the sum of \$5,000, after deducting the amount of mortgages of record against said lands, was paid directly to her, and she signed and executed the deed hereinafter mentioned in reliance upon said promises of defendant to pay her said sum." That there were mortgages of record against the premises, aggregating \$2,800 and no more; that there is due to the plaintiff from defendant as and for the purchase price of said land, and by reason of the premises set forth, \$2,200, with interest, which defendant has failed to pay.

It will be observed that the question of the sufficiency of the complaint was not even raised by a specific objection to the introduction of any evidence under the complaint, but such insufficiency was merely urged

as one of several grounds of objection to a preliminary question. The particular grounds of attack upon the complaint were not specified. The practice of attacking pleadings by objections to evidence should not be encouraged. 31 Cyc. 760. We are all agreed that the complaint in this case was not vulnerable to the objection made.

2. Defendant next contends that the complaint was insufficient and evidence inadmissible thereunder, for the reason that the contract sued upon was void under the statute of frauds. This question was not raised either by answer or objection to evidence, but was first presented in the motion for a directed verdict. Defendant's answer was a general denial followed by an allegation that the defendant "purchased the property described in the complaint from John Erickson, the owner thereof, for the consideration of \$4,000, which consideration defendant has paid in full, and that defendant is not indebted to the plaintiff in any sum whatsoever."

There is a great conflict of authority regarding the proper mode of taking advantage of the statute of frauds. Numerous authorities hold that a defendant, in order to have the benefit thereof, must raise this defense by specific allegations in his answer. 9 Enc. Pl. & Pr. 705 et seq.; 20 Cyc. 313, 315; Sutherland, Code Pl. § 533. Other authorities hold that the defense is available under a general denial, or a denial of the contract, especially when the complaint declares generally on a contract within the scope of the statute of frauds, without alleging whether or not it is in writing. 20 Cyc. 314; Sutherland, Code Pl. § 533; 9 Enc. Pl. & Pr. 709; *Jordan v. Greensboro Furnace Co.* 78 Am. St. Rep. 644, and note (126 N. C. 143, 78 Am. St. Rep. 644, 35 S. E. 247). Where the defence is available under a general denial, it seems that timely objection should be made to evidence of the oral contract, on the ground that it is incompetent under the statute of frauds. 9 Enc. Ev. 122; 20 Cyc. 308, 320, 29 Am. & Eng. Enc. Law, 811.

The authorities, however, are all agreed that the statute of frauds is a personal defense, and can be interposed only by the parties to the contract, or their representatives and privies (29 Am. & Eng. Enc. Law, 807); that a party entitled to invoke the protection of the statute may waive it, if he desires to so do (29 Am. & Eng. Enc. Law, 811); and that a failure to invoke its protection in some appropriate manner

in the trial court will be deemed a waiver of the right to invoke it. The authorities also agree that the defense must be raised. It does not raise itself. Nor can it be urged for the first time on appeal to this court. *Schuyler v. Wheelon*, 17 N. D. 161, 165, 115 N. W. 259.

3. It is unnecessary for us, however, to determine which is the better mode of raising the statute of frauds, and whether it can be raised for the first time by a motion for a directed verdict, because we are satisfied that plaintiff's cause of action herein was not barred by the statute of frauds. The verbal agreement upon which plaintiff's cause of action is predicated was fully performed by her in compliance with its terms. Defendant received an instrument of conveyance executed and acknowledged by plaintiff and her husband. This instrument was concededly sufficient to effect a release of plaintiff's homestead interest in the premises. Defendant not only received, but accepted, such instrument of conveyance, and caused the same to be recorded, and afterwards proceeded to exercise dominion of ownership over the premises in question.

"The statute of frauds has no application where there has been a full and complete performance of the contract by one of the contracting parties, *and the party so performing may sue upon the contract in a court of law. He is not compelled to abandon the contract and sue in equity or upon a quantum meruit.* Particularly is this said to be true where the agreement has been completely performed as to the part thereof which comes within the provisions of the statute, *and the part remaining to be performed is merely the payment of money or the performance of some act the promise to do which is not required to be put in writing.* . . . Thus, where lands have been actually conveyed and possession taken in accordance with the terms of a contract within the statute, the vendor may recover the consideration agreed upon." 29 Am. & Eng. Enc. Law, 2d ed. 832.

"Performance of an agreement, void by the statute of frauds, and acceptance of such performance, is an answer to the statute." *Swain v. Seamens*, 9 Wall. 254, 19 L. ed. 554.

"Where an oral promise relating to the transfer of real property has been performed, the contract of which it is a part is no longer within the statute of frauds by reason of such promise, and accordingly an action will lie for a breach thereof." 20 Cyc. 293.

"The statute is no bar to an action for the price of land actually

conveyed where the deed has been accepted or title has otherwise passed, although the grantor could not have been compelled to convey, or the grantee to accept, a deed, because the contract was oral, and the same is true of an oral agreement to assign the interest of a purchaser under an executory contract of sale; when the title has passed to the assignee he must pay the assignor the price agreed on. The rule holds good when the consideration for the conveyance is not money but a promise of the grantee; an action will lie for the breach of such promise if it is not itself within the statute." 20 Cyc. 294.

"Where a conveyance has been executed and accepted in pursuance of an oral contract for the sale of land, an action may be maintained for a breach of the promise to pay the contract price. The statute of frauds does not apply to such an executed agreement." Niland v. Murphy, 73 Wis. 326, 41 N. W. 335.

In considering a similar question in Galley v. Galley, 14 Neb. 174, 15 N. W. 318, the supreme court of Nebraska said: "It is true that the contract was oral, and, in part, related to a conveyance of land. The action, however, was not brought to enforce either the conveyance or an acceptance of the conveyance agreed upon. . . . This action was merely to recover from Springer Galley damages for refusing to pay for that which he had received. He had agreed to make payment by a delivery of the team and harness, but, refusing to do so, he became liable to an action for damages. *The statute of frauds will not enable one who has accepted a conveyance of land to escape from paying for it simply because the contract of purchase rested in parole.*"

In Hess v. Fox, 10 Wend. 436, in discussing a similar question, the court said: "No question can arise here as to the validity of the agreement to sell. That was performed, and the remaining part was to pay over money, supported by the consideration of land conveyed to the promisor." See also Bourne v. Sherrill, 143 N. C. 381, 118 Am. St. Rep. 809, 55 S. E. 799; Brown v. Hobbs, 147 N. C. 73, 60 S. E. 716.

4. Appellant next contends that the parol agreement was superseded by the deed. In support of this contention appellant cites § 5889, Compiled Laws 1913, which reads: "The execution of a contract in writing, whether the law requires it to be written or not, supersedes all the oral negotiations or stipulations concerning its matter, which preceded or accompanied the execution of the instrument." Appellant asserts that

inasmuch as John Erickson was the record owner of the land, and the deed recited payment of the consideration, stated therein, to "the parties of the first part" (John Erickson and his wife), such recital is binding upon the plaintiff, and she cannot be permitted to show that the greater portion of the consideration was in fact to be paid to her.

Our sister state (South Dakota) has a statutory provision identical in language with § 5889, Compiled Laws 1913. And in considering the effect and proper application thereof, the supreme court of South Dakota, in *De Rue v. McIntosh*, 26 S. D. 42, 47, 127 N. W. 532, said: "This provision of our Code embodies the common-law rule upon the subject of written contracts, and while 'the execution of a contract in writing, whether the law requires it to be written or not, supersedes all of the oral negotiations or stipulations, concerning its matter, which preceded or accompanied the execution of the instruments,' nevertheless, as contended by the appellant, there are exceptions to the rule. And one of the exceptions seems to be that agreements or representations made prior to the written contract under which the party was induced to sign the contract may be shown; in other words, where the parol contemporaneous agreement was the inducing and moving cause of the written contract, or where the parol agreement forms part of the consideration for a written contract, and where he executed the written contract upon the faith of the parol contract or representations, such evidence is admissible. *Chapin v. Dobson*, 78 N. Y. 74, 34 Am. Rep. 512; *Thomas v. Loose*, 114 Pa. 35, 6 Atl. 326; *Dicken v. Morgan*, 54 Iowa, 684, 7 N. W. 145; *Cullmans v. Lindsay*, 114 Pa. 166, 6 Atl. 332; *Barnett v. Pratt*, 37 Neb. 352, 55 N. W. 1050; *Ayer v. R. W. Bell Mfg. Co.* 147 Mass. 46, 16 N. E. 754; *Davis's Sons v. Cochran*, 71 Iowa, 369, 32 N. W. 445; 9 Enc. Ev. 350; *Ferguson v. Rafferty*, 128 Pa. 337, 6 L.R.A. 33, 18 Atl. 484; *Hines v. Willcox*, 96 Tenn. 148, 34 L.R.A. 824, 54 Am. St. Rep. 823, 33 S. W. 914; *Walker v. France*, 112 Pa. 203, 5 Atl. 208." See also *Bourne v. Sherrill*, 143 N. C. 381, 118 Am. St. Rep. 809, 55 S. E. 799; *Brown v. Hobbs*, 147 N. C. 73, 60 S. E. 716.

5. The rule is also well settled that the acknowledgment of the receipt of a consideration in a deed or other written contract is not conclusive, but it may be shown by parole that the consideration agreed upon has not been paid; or that a consideration greater or lesser than, or different from, that expressed in the deed was in fact agreed upon.

“In an action for the consideration money expressed in a deed for lands sold, the clause acknowledging the receipt of a certain sum of money as the consideration of the conveyance or transfer is open to explanation by parol proof. The only effect of this consideration clause in a deed is to estop the grantor from alleging that the deed was executed without consideration. For every other purpose it is open to explanation, and may be varied by parol proof.’ Parol evidence is also admissible to show an additional consideration not inconsistent with the deed.” Devlin, Deeds, 3d ed. § 823.

“It may also be shown by parole, in contradiction of the acknowledgment of the receipt of the consideration, that the grantee, as a part of the consideration, made a verbal promise that he would pay the grantor whatever he might receive over a specified amount upon the resale of the land, and an action of assumpsit will lie to recover the excess.” Devlin, Deeds, 3d ed. § 826.

“It is held by an uncounted multitude of authorities that the true consideration of a deed of conveyance may always be inquired into, and shown by parol evidence, for the obvious reason that a change in or contradiction of the expressed consideration does not affect in any manner the covenants of the grantor or grantee, and neither enlarges nor limits the grant.” 17 Cyc. 653. See also *Johnson v. McClure*, 92 Minn. 257, 99 N. W. 893, 2 Ann. Cas. 144, and extended note on page 146; *Cummings v. Putnam*, 19 N. H. 569; *Musselman v. Stoner*, 31 Pa. 265; *Pearson v. Bank of Metropolis*, 1 Pet. 89, 7 L. ed. 65; *Carr v. Dooley*, 119 Mass. 294; *Cole v. Hadley*, 162 Mass. 579, 39 N. E. 279; *Paul v. Owings*, 32 Md. 402; *Sivers v. Sivers*, 97 Cal. 518, 32 Pac. 571; *Koogle v. Cline*, 110 Md. 587, 24 L.R.A.(N.S.) 413, 73 Atl. 672; *Velten v. Carmack*, 23 Or. 282, 20 L.R.A. 101, 31 Pac. 648; *Fowlkes v. Lea*, 84 Miss. 509, 68 L.R.A. 925, 36 So. 1036, 2 Ann. Cas. 466; *Shehy v. Cunningham*, 81 Ohio St. 289, 25 L.R.A.(N.S.) 1194, 90 N. E. 805; *First State Bank v. Kelly*, 30 N. D. 84, 152 N. W. 125; 6 Am. & Eng. Enc. Law, 767; *Jones, Ev.* § 469; *Washb. Real Prop.* 6th ed. §§ 2281, 2283; *Gage v. Cameron*, 212 Ill. 146, 72 N. E. 204.

Not only may a grantor maintain an action for the whole or any part of the unpaid purchase price, and in such action show the true considera-

tion for the deed, and that such consideration remains unpaid in whole or in part, but a person not a party to the deed may in a proper case maintain such suit, and show by parole that the grantee retained a part of the consideration money under an agreement with the grantor to pay such moneys to such third person.

"So, it may be shown by parole evidence for the purpose of creating a resulting trust that the consideration price was not paid by the grantee, but by a third person. Such evidence does not tend to contradict the deed. The recital of payment may state that the consideration was paid by the grantee, but it does not state that it was his money. This is a fact outside of the conveyance." Devlin, Deeds, 3d ed. § 826.

"The grantor may show, notwithstanding the acknowledgment of payment of the consideration in the deed, that the grantee retained a part of the money to be applied to the grantor's use. So, it may likewise be shown that the part of the money retained by the grantee was to be paid by him to a third person for the grantor's benefit. So, it is permissible to show by parole evidence that the grantee has retained a part of the consideration money, under an agreement to pay the note of the grantor to a third person, and, in an action for money had and received to his use, such third person may recover the amount of the note and interest." Devlin, Deeds, 3d ed. § 828.

"It may be shown, although not expressed in a deed, that the grantee agreed as part of the consideration to pay or assume an existing encumbrance, *even though the deed contains a covenant of warranty against encumbrances*, for such evidence does not destroy the warranty, but leaves it in full force and effect except as to the specific encumbrance, the payment or assumption of which was a part of the consideration." 17 Cyc. 655.

In *Moore v. Booker*, 4 N. D. 543, 549, 62 N. W. 607, this court held that even though an existing mortgage was, by recital in the deed, expressly excepted from the covenant of warranty, still it might be shown by parole that the grantee agreed as a part of the consideration to assume the payment of such mortgage. The court said that the rule of evidence that a written contract cannot be varied, contradicted, or added to by parole had no application, and that "the contract by which a grantee assumes the payment of existing encumbrances is separate and distinct from the conveyance. It may be, and often is, embodied in

the deed ; but it may be by separate writing, or it may rest entirely in parole." See also McDonald v. Finseth, 32 N. D. 400, L.R.A.1916D, 149, 155 N. W. 863.

In considering the same question in the case of Miller v. Kennedy, 12 S. D. 478, 482, 81 N. W. 906, the supreme court of South Dakota said: "Counsel insist that it was error to allow respondent Kennedy and the defendant Overholser to testify that the latter, as part consideration for the premises, orally agreed to pay the mortgage indebtedness, and it is urged that such proof tended to vary the terms of the deed, and contradict the consideration expressed therein. To us it seems clear that the contract to assume and pay the mortgage was wholly independent of anything contained in the deed, the consideration of which is always open to inquiry so long as proof with reference thereto in no manner tends to destroy its validity, and the testimony was properly admitted.

"Surely, such an agreement, fully performed by the grantor, who has executed a deed and surrendered possession to the grantee, is not within the statute of frauds, requiring it to be in writing, nor is it an agreement to pay the debt of a third person, but wholly an original undertaking, relating to the consideration of the conveyance, and need not be in writing."

In Calvert v. Nickles, 26 S. C. 304, 2 S. E. 116, the father of the plaintiffs conveyed to defendant a tract of land. The plaintiffs claimed that the consideration for said deed, in part, was the agreement of defendant to pay the sum of \$100 to each of the plaintiffs (grantor's four children). The court held that such moneys might be recovered in an action at law upon the promise to pay. The court said: "The doctrine that parol evidence is not admissible to contradict or alter a written instrument is well established,—no doubt about this; but we do not see that this rule has been violated here. The purpose of the plaintiffs in introducing the testimony objected to was not to alter, add to, or contradict the deed, or to change its character in any way; *it was simply to show the manner and to whom the purchase money was to be paid.* This under the case of Curry v. Lyles, 2 Hill, L. 404, we think was unobjectionable."

It is conceded by both parties to this lawsuit that the deed was executed and delivered by the plaintiff and her husband to the defendant;
33 N. D.—14.

that defendant accepted the same, and caused it to be recorded, and subsequently assumed control of and exercised ownership over, the premises conveyed by the deed. Both parties admit that this deed was executed and delivered pursuant to a certain oral agreement concerning the manner of payment of the consideration. Both parties contend that the recital in the deed regarding the consideration and the payment thereof is not in accordance with the real facts. The plaintiff claims that the defendant agreed to pay \$5,000 in all, as was stated in the deed, and that he has failed to pay that portion of such sum which he agreed to pay to her. The defendant, on the other hand, claims that the consideration was not \$5,000, as stated in the deed, but only \$4,000, and consisted not of money, but the assumption by defendant of certain debts against John Erickson, and the promise on the part of the defendant, (1) to advance \$300 to Erickson; (2) to reconvey the premises to Erickson upon certain conditions. Plaintiff's version is certainly no more inconsistent with the recitals of the deed, than the version of defendant. According to plaintiff's testimony she executed the deed in reliance upon defendant's promise to pay her so much money. This promise relates to the payment of the consideration, and formed the inducement which caused her to execute the deed. "To deny the admission of evidence in such case, if relevant to the issue made by the pleadings, would (in effect) be to allow one of the parties to induce another to enter into the engagement under false representations, and to aid him to enforce it against his adversary, notwithstanding the fraud practised upon him by holding out to him the fraudulent inducement."

Under the laws of this state, "the homestead of a married person cannot be conveyed or encumbered, unless the instrument by which it is conveyed or encumbered is executed and acknowledged by both husband and wife." Comp. Law, 1913, § 5608. Defendant desired to purchase the land involved. Plaintiff had a homestead interest therein. The only way defendant could acquire title was by a conveyance executed and acknowledged by both John Erickson and the plaintiff. A deed executed by John Erickson alone would have been a nullity. A sufficient deed of conveyance was executed, acknowledged, and delivered. Defendant received what he desired,—a conveyance of the homestead of John Erickson by a valid deed free and clear of all claims of plaintiff to a homestead interest therein. Plaintiff does not assert any right or

title in derogation of the deed, nor seek to defeat its purpose or effect. She is perfectly willing that defendant should retain the premises and enjoy the benefit of the estates conveyed and released to him by the grantors in the deed. All she asks is that defendant pay the consideration he agreed to pay for a conveyance and release of such estates.

6. While not argued in appellant's brief, it was contended on oral argument that the plaintiff by executing (jointly with her husband) a deed containing covenants of seisin and warranty, became estopped to assert that she joined therein for the purpose of releasing her homestead right. This question was not presented in the trial court, either by answer or otherwise. The general rule is that an estoppel by deed, in order to avail the defendant, must be pleaded, where there is an opportunity to do so.

8 Enc. Pl. & Pr. 9; 8 Standard Enc. Proc. 693; Schofield v. Cooper, 126 Iowa, 334, 102 N. W. 110; Gilson v. Nesson, 208 Mass. 368, 94 N. E. 471; Newport Pressed Brick & Stone Co. v. Plummer, 149 Ky. 534, 149 S. W. 905; Johns v. Clothier, 78 Wash. 602, 139 Pac. 755; Harle v. Texas Southern R. Co. 39 Tex. Civ. App. 43, 86 S. W. 1048; Grooms v. Morrison, 249 Mo. 544, 155 S. W. 430; Conrow v. Huffine, 48 Mont. 437, 138 Pac. 1094; Fritz v. Mills, 12 Cal. App. 113, 106 Pac. 725; Parlman v. Young, 2 Dak. 184, 4 N. W. 139, 711; Borden v. McNamara, 20 N. D. 225, 127 N. W. 104, Ann. Cas. 1912C, 841.

In this case plaintiff's complaint expressly referred to the deed as the instrument executed, acknowledged, and delivered by plaintiff to the defendant in compliance with the verbal agreement. In addition to the allegations heretofore set forth, the complaint also contained the following: "That thereafter and on the 22d day of July, 1911, in reliance on the promise and agreement of defendant, and the premises hereinbefore set forth, this plaintiff did make, execute, acknowledge, and deliver to the defendant her certain warranty deed for the land above described, which said deed was filed for record in the office of the register of deeds in and for Burke county, North Dakota, on the 22d day of July, 1911, and recorded in book 6 of deeds at page 64, which said deed recites a consideration of \$5,000, and is by reference made a part of this complaint." Hence, defendant certainly had an opportunity to plead the estoppel, if he intended to rely thereon as a defense,

but he failed to do so, and it seems clear that he cannot be permitted to assert such defense for the first time in the appellate court.

7. But even if such defense had been pleaded and presented in the court below, it would not bar plaintiff's right of recovery, under the facts in this case.

Bouvier (Bouvier's Law Dict. Rawle's 3d Rev.), defines estoppel: "*The preclusion of a person from asserting a fact, by previous conduct inconsistent therewith, on his own part or the part of those under whom he claims, or by an adjudication upon his rights which he cannot be allowed to call in question.*"

And estoppel by deed: "Such as arises from the provisions of a deed. It is a general rule that a party to a deed is estopped to deny anything stated therein which has operated upon the other party; as, the inducement to accept and act under such deed."

Henderson, Ch. J., speaking for the court in *Den ex dem. Brinegar v. Chaffin*, 14 N. C. (3 Dev. L.) 108, 22 Am. Dec. 711, said: "Recitals in a deed are estoppels when they are of the essence of the contract; that is, where, unless the facts recited exist, the contract, it is presumed, would not have been made."

In *Gjerstadengen v. Hartzell*, 9 N. D. 268, 277, 81 Am. St. Rep. 575, 83 N. W. 230, this court said: "It is well settled that 'a party setting up an estoppel must always show as an essential part of his case that he will be subjected to loss if he cannot set up the estoppel. . . . An estoppel was never intended to work a positive gain to a party, but its whole office is to protect him from a loss which, but for the estoppel, he could not escape.'"

In *Haugen v. Skjervheim*, 13 N. D. 616, 102 N. W. 311, this court stated the rule thus: "An equitable estoppel by deed or *in pais* is not created or enforceable unless there has been a change in the situation of one of the parties in reliance on the deed or statements, followed by damage."

In the case at bar defendant was not misled by any recitals in the deed. He had personal knowledge of all the facts. He knew that John Erickson was the record owner, and that the plaintiff only had and claimed a homestead interest. Possessed of this knowledge he drew a deed with his own hands. This deed he presented to plaintiff and her husband for execution. Plaintiff's execution and acknowledgment

thereof was necessary to release her homestead interest, and give any validity to the instrument as a conveyance. Plaintiff and her husband (so she testified and so the jury found) executed and acknowledged the deed, and delivered the same to the defendant in consideration of \$5,000, of which \$150 was to be paid to John Erickson, \$2,800 and accrued interest to be paid to the mortgagees holding mortgages on the land, and the remainder (\$1,553.01), to be paid to the plaintiff. Plaintiff does not seek to impeach defendant's title to the premises, or set up any title thereto inconsistent with the deed. It is conceded she had a homestead interest. It is also conceded that, under the laws of this state, a homestead can be conveyed only by an instrument executed and acknowledged both by the husband and wife. It is undisputed that plaintiff, together with her husband, executed and acknowledged such instrument, and thereby released to defendant her homestead interest. Defendant, by virtue of such instrument, became the owner of the premises, free and clear of plaintiff's homestead interest. Without her execution and acknowledgment thereof his deed would have been a nullity. If the facts are as plaintiff claims (and the jury found), then defendant has not paid the consideration he agreed to pay. Plaintiff merely asks that he pay such consideration in the manner which, and to the person to whom, he agreed to pay the same. It is difficult to see how, under the facts in this case, an estoppel can exist or be invoked in favor of the defendant to defeat plaintiff's right of recovery.

8. Appellant next asserts that the court erred in overruling defendant's objections to three questions asked plaintiff by her counsel on redirect examination.

The questions, objections, rulings, and answer were as follows:

Q. This oldest child, can he read?

Objected to as incompetent, irrelevant, and immaterial, not proper redirect examination.

No answer.

No ruling.

Q. He does not know anything, does he?

Objected to as incompetent, immaterial, not proper redirect examination, not tending to prove any facts in this case and prejudicial.

Overruled. Exception.

A. No.

Q. Has he ever been able to help himself in any particular?

Objected to as incompetent, palpably irrelevant, and immaterial, and highly objectionable.

Overruled.

Exception.

A. No.

Appellant's counsel argues that the admission of this testimony was prejudicial error. The principal defect in counsel's argument is that it ignores the fact that the testimony relative to plaintiff's children, their number, ages, and educational qualifications, was first elicited by defendant's own counsel on cross-examination of the plaintiff. Upon the direct examination of plaintiff, her counsel asked her the following question: "Q. How many children were there?" Defendant's counsel objected to this question as immaterial and not tending to prove any issues in the case. The objection was sustained, and the question remained unanswered. This was the only question asked by plaintiff's counsel regarding the children upon plaintiff's direct examination. But during plaintiff's cross-examination, defendant's counsel went fully into the matter of the children, their ages, and ability to talk, read, and write English, and the questions upon which error is predicated were asked by plaintiff's counsel upon redirect examination immediately following the cross-examination. We quote from the cross-examination and redirect examination of the plaintiff as contained in the record:"

Cross-examination by defendant's counsel.

Q. Didn't Mrs. Rouse write letters to Mr. Sinkler at your request for you about this case?

A. She wrote, but it was me that wrote it, but I cannot understand English, so I have to have somebody help me to say right or wrong.

Q. Who did you get to write the letters?

A. I had Mrs. Rouse to write it.

Q. You cannot understand English at all, you cannot scarcely speak it?

A. I can talk some, but I cannot read no English.

Q. Can your boys speak English?

A. Yes, some, but they are not very good.

Q. Can they read English?

- A. Some can.
- Q. Can they write English?
- A. Some of them.
- Q. How many children living at home with you?
- A. I got eight.
- Q. How old is the oldest one?
- A. He is twenty-five.
- Q. At home?
- A. Yes.
- Q. How old is the next one at home?
- A. The next fourteen.
- Q. The next one?
- A. The next one,—the boy is nineteen.
- Q. Twenty-five—nineteen?
- A. Yes and fourteen and the baby is thirteen.
- Q. These children all born in this country?
- A. No.
- Q. Where were they born?
- A. Born in Minnesota.
- Q. I mean in the United States, were they all born in the United States?
- A. Oh, yes.
- Q. All go to school?
- A. No, they don't go to school.
- A. Besides him, or the nineteen year old?
- A. Twenty-five don't go to school either.
- Q. Never did?
- A. No.
- Q. Did the nineteen?
- A. *No, he started, but he could not talk and he could not read.*
- Q. How about the fourteen year old?
- A. She can read and write.
- Q. You had several children who could write letters in English?
- A. Yes, but they are young and they don't understand such a thing as that.

Re-direct Examination.

By Mr. Sinkler:

Q. This oldest child, cannot he write?

Objected to as incompetent, irrelevant, and immaterial, not proper redirect examination, and immaterial.

Q. He does not know anything, does he?

Objected to as incompetent, immaterial, not proper redirect examination not tending to prove any facts in this case and prejudicial.

Overruled. Exception.

A. No.

Q. That twenty-five year old boy that is at home?

A. Yes.

Q. Has he ever been able to help himself in any particular?

Objected to as incompetent, palpably irrelevant, and immaterial, and highly prejudicial, and not tending to prove any of the facts in this case, and not admissible under the pleadings.

Overruled. Exception.

Objected to as not proper redirect examination.

Overruled. Exception.

A. No.

Q. Can he write?

A. No.

Q. Can he read?

A. No.

The above contains every question regarding the children, asked by plaintiff's attorney, which plaintiff was permitted to answer, or did answer. Can it be seriously contended (in view of the preceding cross-examination), that the admission over objection of plaintiff's answers to these two questions constituted prejudicial error, or error at all? We think not. This subject was opened up on cross-examination by defendant's counsel. Where new matter is brought out on cross-examination, the adverse party is entitled as a matter of right to re-examine the witness regarding the new matter so brought out. Jones, Commentaries on Evidence, § 871. Although of course such re-examination must be confined to proper limits, and the trial judge necessarily has a wide discretion in determining the extent thereof. Obviously plaintiff's redirect examination was not outside the proper scope.

9. The proposition next argued is that the court erred in sustaining objections to certain questions propounded by defendant's counsel to the

witness Johnson. This argument is predicated upon the following specification of error: "The court erred in sustaining the objections to all questions on page 140, statement of case." We are agreed that this specification is too general to require consideration by this court. *Willoughby v. Smith*, 26 N. D. 209, 144 N. W. 79; 3 C. J. §§ 1519 et seq. See also 38 Cyc. 1405; *Northern Grain Co. v. Pierce*, 13 S. D. 265, 83 N. W. 256; *Schmidt v. Carpenter*, 27 S. D. 412, 131 N. W. 723, Ann. Cas. 1913D, 296. But an examination of the record convinces us that no error was committed by the trial court in the rulings complained of.

Johnson was called by the defendant to impeach plaintiff's witness Mrs. Rouse.

As a foundation for such impeachment, Mrs. Rouse was asked, and answered the following questions on her cross-examination:

Q. Didn't you tell Mr. Pete Johnson, the man who runs the First State Bank of Lignite, that if he could get that land for you from Wiper that you would take it at \$4,000?

A. We told him we would give him a reasonable amount up to \$5,000 for that land, but not for me.

Q. That is what you told Johnson?

A. Yes.

Q. That is what you told Johnson?

A. Yes.

Q. Didn't you tell him also you would only pay \$4,000, and if Wiper would let you have it for that amount it would stop this lawsuit?

A. I did not.

Q. Did you ever at any time tell Pete Johnson that, if he could get the farm from Mr. Wiper at any price, this lawsuit would stop?

A. No, never did.

Peter Johnson was subsequently called as a witness by defendant, apparently for the purpose of impeaching Mrs. Rouse's testimony regarding the matter referred to in her cross-examination.

We quote from his testimony as contained in the record:

Q. Did you hear the testimony of Mrs. Rouse yesterday relative to having you see Mr. Wiper for the purpose of purchasing this Erickson quarter from him at a figure ranging any place between \$4,000 and \$5,000?

Objected to as incompetent, irrelevant, and immaterial, improper impeachment, being upon a collateral matter.

Defendant's Attorney:—It is not offered for impeachment.

Overruled. Exception.

A. I did.

Q. Did you ever talk with Mrs. Rouse relative to buying the Erickson land for her from Mr. Wiper?

Objected to as no foundation is laid, incompetent, no foundation laid in the question which was asked the witness Rouse when she was upon the witness stand, no time and place being fixed at which the conversation had taken place, and in order to impeach the witness, the time, place, and occurrence must be particularly called to the attention of the witness sought to be impeached, and on the further ground it is an attempted impeachment upon a collateral matter.

Defendant's Attorney:—It is not offered for impeachment.

Sustained.

Q. Mr. Johnson, did Mrs. Rouse in the conversation to which she testified to while on the witness stand as having had with you relative to you purchasing the John Erickson quarter from Mr. Wiper for her, authorize you to pay from \$4,000 to \$5,000 for it?

Objected to as incompetent, irrelevant, and immaterial, and on the same ground as urged in the last objection.

Overruled. Exception.

A. She did not.

Q. What did she tell you to offer for that quarter section?

Same objection.

Overruled. Exception.

A. \$4,000.

Q. At the time you were having this talk with her how long did you talk this matter over?

A. I should say—about two hours.

* * * * *

Q. Did she go into the details between the Ericksons and Wiper in talking to you about this matter?

A. Yes.

Q. When she said she wanted you to get it for \$4,000, did she say anything about letting them know who was buying it?

Objected to as incompetent, immaterial, not an impeaching question,

and not binding on the plaintiff, no foundation is laid, and, if for the purpose of impeachment, it is on a collateral matter.

Defendant's Attorney:—It is not for the purpose of impeachment.

Sustained. Exception.

Q. During the talk had there, was there anything said by Mrs. Rouse to you relative to the, to this lawsuit between Mrs. Erickson and Mr. Wiper being settled if you could buy the land from Wiper for her for \$4,000?

Objected to as incompetent, and on the same grounds as last stated, and an attempt to inject into the record, matter that is immaterial, and no foundation is laid for it, and not a proper impeaching question, it does not put to the witness the substance of the question that was asked of the witness.

Sustained. Exception.

Q. Mr. Johnson, in that conversation between you and Mrs. Rouse wherein she asked you to purchase the land from Mr. Wiper for \$4,000, did she state to you in substance that, in the event you could purchase this land from Mr. Wiper for him, that it would settle this lawsuit, and in the event that you could not get the land for her, and he refused and failed to sell it to her for \$4,000 that the lawsuit would go on, and that Mrs. Erickson would get \$5,000 out of him for it?

Objected to on same ground as stated in prior objection.

Sustained. Exception.

The error assigned and argued purports to be predicated upon the court's rulings in sustaining objections to the last two questions set out above. No complaint is made of the other rulings. It is conceded that plaintiff was not present at the time the conversation between Mrs. Rouse and Johnson took place. If Johnson's testimony was admissible at all, it could only be on the theory that it impeached Mrs. Rouse, by showing (1) her bias or interest in the lawsuit; (2) a variance between her statements at the time of the conversation, and her testimony. But defendant's counsel expressly denied that such testimony was offered for impeachment purposes. No intimation is given of any other purpose for which it could possibly be admissible. In spite of this fact, however, Johnson was permitted to state his version of the conversation at some length. Defendant has no reason to complain of the rulings under consideration.

10. Appellant next complains of the court's rulings in striking out the answers given by the defendant, Wiper, to two certain questions.

The questions and answers were as follows:

Q. Did you, at any time, have any conversation of the kind or character that you were to give \$5,000 for it, and that the mother was to have all of it but \$150, which was to go to the father?

A. No, when she was on the stand was the first time I heard her mention the transaction.

Moved to strike out the answer as not responsive.

The Court: Stricken out.

Q. Was there an understanding there that she was to get all over \$2,800 except \$150 that were going to John Erickson?

Exception.

A. No, there was \$300 to go to John Erickson.

Moved to strike out answer as not responsive.

Exception.

The Court: Stricken out.

It is not only the right, but under certain circumstances it becomes the duty, of the trial court to strike out irresponsible answers. The questions under consideration obviously required either "yes" or "no" for answer. The witness did not so answer them. It is conceded that the greater portions of the answers were properly stricken. Appellant's sole contention is that the word "no" in each answer was responsive, and that therefore it was error to strike out the entire answers. The trial judge necessarily must be vested with considerable discretion in, and control over, the examination of witnesses, and we are not prepared to say that he oversteps the limits of his authority or discretion by striking out the entire answer, where the greater portion thereof is irresponsible. In such case counsel has ample opportunity to obtain a proper answer, by repeating the question to the witness.

11. But in this case defendant could not possibly be prejudiced by the rulings complained of, as he testified fully upon the same matter elsewhere in his testimony. Defendant not only fully denied any such conversation or understanding referred to in the two questions, but testified positively to an entirely different conversation and understanding. Defendant's negative answers to the two questions under consideration would in reality have added nothing to his testimony. It was at

the most a repetition of his testimony on this question. Hence, the rulings were not prejudicial, as the rule is well settled that the error, if any, in striking out an answer as irresponsible is cured where the witness elsewhere in the testimony has testified or is permitted to testify to the substance of the answer stricken. 38 Cyc. 1460, 1462.

12. Defendant also assigns error upon the denial of the motion for a directed verdict. No particular argument is presented in support of this proposition in appellant's brief, but it is stated that appellant's argument with respect to the sufficiency of the complaint, the statute of frauds, and the insufficiency of the evidence, covers this assignment of error. An examination of the motion for a directed verdict shows that it is based almost exclusively upon the alleged insufficiency of the complaint. The only part of the motion which attempts to raise the sufficiency of the evidence or the statute of frauds is as follows: "That the evidence shows that the said plaintiff never at any time executed and delivered to the defendant a conveyance of said land other than as indicated by the deed joined in by this plaintiff with her husband, John Erickson, which is in evidence here. Exhibit '1,' the contract as set forth by plaintiff in the complaint, being an oral contract, and the statute of this state providing that all contracts for the sale of land shall be in writing, and therefore under the evidence the plaintiff's contract was within the statute of fraud and void. For the further reason that the plaintiff has failed to comply with the terms of the agreement pleaded in the complaint, the statute of this state providing that the only manner in which the homestead can be conveyed by an instrument signed by the husband and wife jointly, and that no such instrument has been pleaded in plaintiff's complaint."

It is unnecessary for us to devote any further time or space to a consideration of this assignment, as appellant's counsel virtually concedes that this assignment rests upon and will be controlled by a decision of the questions of the sufficiency of the complaint and the statute of frauds, and in view of the conclusion we have reached, with reference to these assignments, it follows that defendant's assignment of error predicated upon the denial of the motion for a directed verdict must also fall.

13, 14. The next grounds on which a reversal is predicated are cer-

tain remarks alleged to have been made by plaintiff's counsel in his argument to the jury.

The record on which the assignment of error is based is as follows:

Defendant's Attorney: The defendant at this time takes exception to the remarks of counsel to the jury wherein he stated to the jury, "I will tell you what I think about it. I think the defendant never intended to fulfil his promise." Overruled. Exception.

Defendant's Attorney: Object to the remarks to the jury as highly prejudicial and hearsay wherein counsel states it is not to be wondered at, "this gang from Bowbells are all here telling the same story for the purpose of robbing this woman," as not warranted by the evidence.

Overruled. Exception.

Defendant's Attorney: Exception to the remarks of counsel wherein he states that defendant wanted to get the plaintiff into Canada, and that the reason for wanting to get her there was to get her out of reach so he would not have a lawsuit, or words to that effect, as incompetent, as not within the evidence and highly prejudicial.

Overruled. Exception.

Defendant's Attorney: Exception to the remarks of counsel, "She could have the rents and profits of that land for a year after it had been foreclosed," as not within the evidence and contrary to the statute in this state.

Overruled. Exception.

A party asserting error has the burden of proving it. And as was said by this court in *Davis v. Jacobson*, 13 N. D. 430, 101 N. W. 314, he has the burden of preparing and presenting a record showing such error affirmatively. See also *State v. Gerhart*, 13 N. D. 663, 102 N. W. 880; *State v. Scholfield*, 13 N. D. 664, 102 N. W. 878. This rule applies with more than usual strictness where error is predicated on rulings upon matters resting largely within the trial court's discretion. An abuse of discretion will not be assumed, but must clearly be shown by the party asserting error. The party predicating error on improper argument must present a record showing: (1) The objectionable language used; (2) the objection made; (3) the court's ruling on the objection. *Bradshaw v. State*, 17 Neb. 147, 22 N. W. 361, 363, 5 Am. Crim. Rep. 499. In this case the record does not show the language used. It merely shows the objection and the court's ruling thereon.

This is clearly insufficient to permit a review. So far as this court knows, the conclusions of defendant's counsel as to what plaintiff's counsel said may have been entirely erroneous. There is no greater presumption that plaintiff's counsel misquoted the evidence in his argument, than that defendant's counsel misquoted the remarks of plaintiff's counsel in his objection. The trial judge knew. He overruled the objection. He said it was not well founded. For what reason we do not know. It might have been that the remarks were never made. The presumption is that the trial court's rulings were correct, and the burden is upon the appellant to show affirmatively by the record that the rulings were incorrect. If the rulings can be sustained on any ground, this will be done. *Davis v. Jacobson*, 13 N. D. 430, 432, 101 N. W. 314. Nor are we prepared to say that the argument of plaintiff's counsel, if made as assumed in the objections, would constitute prejudicial error.

In *State v. Kent* (*State v. Pancoast*) 5 N. D. 521, 559, 560, 35 L.R.A. 518, 67 N. W. 1052, wherein defendant was convicted of murder in the first degree, and the death penalty affixed, this court said: "It is not claimed in this case that there was a violation of any statutory limitations upon counsel. The objections are placed upon broader grounds, and, to support them, it must clearly appear that counsel have stepped beyond the bounds of any fair and reasonable criticism of the evidence, or any fair and reasonable argument based upon any theory of the case that has support in the testimony. This rule was never intended to limit counsel in any manner that could injuriously affect his case upon the merits. He is allowed a wide latitude of speech, and must be protected therein. He has a right to be heard before the jury upon every question of fact in the case, and in such decorous manner as his judgment dictates. It is his duty to use all the convincing power of which he has command, and the weapons of wit and satire and of ridicule are all available to him so long as he keeps within the record. He may draw inferences, reject theories and hypotheses, impugn motives, and question credibility, subject only to the restriction that, in so doing, he must not get clearly outside the record, and attempt to fortify his case by his own assertions of facts, unsupported by the evidence. See *Tucker v. Henniker*, 41 N. H. 317; *Brown v. Swineford*, 44 Wis. 282, 28 Am. Rep. 582; *Martin v. State*, 63 Miss.

505, 56 Am. Rep. 812; Rolfe v. Rumford, 66 Me. 564; McDonald v. People, 126 Ill. 155, 9 Am. St. Rep. 547, 18 N. E. 817, 7 Am. Crim. Rep. 137. But this matter is, and of necessity must be, largely within the discretion of the trial court, and the action of the trial court should be reversed only in cases of clear and prejudicial abuse of this discretion."

In State v. Moeller, 24 N. D. 165, 169, 138 N. W. 981, this court, speaking through Justice Burke, said: "This attorney, Mr. Sinkler, in closing his remarks to the jury, used language of which defendant now complains. It will not be necessary to set much of it out in this opinion, but the gist of the statement is as follows: 'A moloch who kills unborn children for the sake of the almighty dollar,' 'professional abortionist,' etc. It is claimed that these statements are not supported by evidence and prejudicial to the defendant. . . . In the heat of combat something may be said or done that needs correction. The trial court is there for that purpose. If the state's attorney makes remarks such as the above, the defendant must make complaint at once, or the trial court may conclude that they are not objectionable. In the case at bar no complaint was made to the trial court, because, as counsel states, 'he did not care to interfere with the argument.' Some attorneys take swift advantage of the sympathy of the jury for anyone in trouble, and use the remarks of the state's attorney as a basis for a 'fair-play' appeal to the jury. In the absence of complaint, the court may have assumed that such was the intention of defendant's attorneys. The matter is one largely in the discretion of the trial court, who heard all of the argument, and heard and saw the possible provocation."

15. The next and last proposition argued by appellant is that the evidence is insufficient to justify the verdict. This argument is predicated upon the following two specifications:

"(A). The evidence is insufficient to establish the allegation of the complaint that the defendant agreed to pay to the plaintiff five thousand dollars (\$5,000) or any other sum for the release of her homestead interest in and to the real estate described therein.

(B). The evidence conclusively shows that the entire transaction relating to the sale of the real estate described in the complaint was had by the plaintiff's husband and the defendant, and that the purchase price

to be paid therefor was four thousand dollars. The record shows that the full amount has been paid.

These particular grounds of insufficiency are not mentioned in the motion for a directed verdict, but are upon entirely different, specific grounds. They are not considered. The rule seems well settled that when a directed verdict is made, the appellate court cannot change them or to add others in the appellate court. *v. Laughlin*, 4 N. D. 391, 61 N. W. 27; *v. Lincoln*, 4 N. D. 410, 61 N. W. 147; *v. Perkins*, 132 N. W. 1007; *Perkins v. Thorson*, 132 N. W. 1007; *v. Cedar Rapids*, 126 Iowa, 361, 100 N. W. 140; *Morse v. Houghton*, 158 Iowa, 277; *Jersey Street R. Co.* 69 N. J. L. 45; *v. W. B. Johnson & Co.* 393; *Atl.* 1095; *Boyle v. Union P. R. Co.* 52 N. Y. Sup. 693; *v. Alteria*, 23 Misc. 693, 52 N. Y. Sup. 693.

No motion for new trial was made. The evidence now sought to be raised was not in the trial court, and, hence, under the rule, it cannot be raised for the first time in the appellate court. Such question could be considered only on a motion for a new trial.

The people in their Constitution have said that no person shall be deprived of life, liberty or property without due process of law, "the right of trial by jury shall be preserved, and no person shall be tried for any offense until he shall be tried and determined in the trial court." (N. D. Const. § 7.) The supreme court "shall have appellate jurisdiction in all cases where errors assigned upon the proceedings in any trial court." (N. D. Const. § 86.) Therefore on appeal it is the duty of the appellate court to review the trial court's findings and must present a report of such error. *v. Cunningham*, 6 N. D. 426; *v. Starn*, 132 N. W. 148; *v. Jacobson*, 13 N. D. 430.

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to be paid therefor was four thousand dollars (\$4,000) and further shows that the full amount has been paid."

These particular grounds of insufficiency of evidence were not mentioned in the motion for a directed verdict. Such motion was based upon entirely different, specific grounds, which we have already considered. The rule seems well settled that where a motion for nonsuit or a directed verdict is made, the appellate court will consider only the grounds urged in the trial court, and appellant will not be permitted to change them or to add others in the appellate court. *First Nat. Bank v. Laughlin*, 4 N. D. 391, 61 N. W. 473; *Minnesota Thresher Mfg. Co. v. Lincoln*, 4 N. D. 410, 61 N. W. 145; *Woods v. Stacy*, 28 S. D. 214, 132 N. W. 1007; *Perkins v. Thorson*, 50 Minn. 85, 52 N. W. 272; *Earl v. Cedar Rapids*, 126 Iowa, 361, 106 Am. St. Rep. 361, 102 N. W. 140; *Morse v. Houghton*, 158 Iowa, 279, 136 N. W. 675; *Zeliff v. North Jersey Street R. Co.* 69 N. J. L. 541, 55 Atl. 96, 14 Am. Neg. Rep. 393; *W. B. Johnson & Co. v. Central Vermont R. Co.* 84 Vt. 486, 79 Atl. 1095; *Boyle v. Union P. R. Co.* 25 Utah, 420, 71 Pac. 988; *Pfau v. Alteria*, 23 Misc. 693, 52 N. Y. Supp. 88. See also 3 C. J. § 800.

No motion for new trial was made. The question of insufficiency of the evidence now sought to be raised was therefore not raised in the trial court, and, hence, under the holding of this court in *Morris v. Minneapolis, St. P. & S. Ste. M. R. Co.* 32 N. D. 366, 155 N. W. 861, cannot be raised for the first time in the appellate court. But even if such question could be considered, it must be decided against appellant's contention.

The people in their Constitution have said that in cases like the one at bar, "the right of trial by jury shall be secured to all, and remain inviolate." (N. D. Const. § 7). They have, also, said that such causes shall be tried and determined in the district court (Const. § 103), and that the supreme court "shall have appellate jurisdiction only." (Const. § 86.) Therefore on appeal in a jury case this court reviews only the errors assigned upon the proceedings had in the trial court. *Thompson v. Cunningham*, 6 N. D. 426, 430, 71 N. W. 128; *State v. Knudson*, 21 N. D. 562, 132 N. W. 149. And the appellant has the burden of proving, and must present a record affirmatively showing, such error. *Davis v. Jacobson*, 13 N. D. 430, 101 N. W. 314.

The principal issue in this case was one of veracity. We have al-

33 N. D.—15.

ready set forth, in part, the testimony of both the plaintiff and defendant. There was a square conflict between these parties. The real question for the jury to determine in this lawsuit was whether Mrs. Erickson or Wiper told the truth. If Wiper told the truth, he had paid for the land in full. If Mrs. Erickson told the truth, then Wiper still owed her the amount which she was awarded by the jury. Hence, in this case the prime question was one of credibility of the witnesses and the weight of the testimony of the respective parties. These were questions for the jury. 38 Cyc. 1516, 1518. The jury decided these questions in favor of the plaintiff. The jury's finding is binding on this court.

What we have said above disposes of every assignment of error presented by appellant on this appeal. Not a single question has been ignored or passed. We have, perhaps, quoted from the record to a needless extent, but we have done so in order that the correctness and fairness of the rulings of the trial court may be apparent to anyone. Defendant has no cause for complaint on account of any ruling of the trial court.

It is argued that the jury in arriving at its verdict was influenced by passion or sympathy. As already stated no motion was made for a new trial, and the question under consideration was never presented to the trial court for determination, and there are no specifications of error under which it could be considered in this court. But, as we have already stated, the principal issue for the jury to determine was whether Mrs. Erickson or Wiper told the truth. The question of sympathy can hardly enter into a case of this kind so as to affect the verdict. If Wiper told the truth, and Mrs. Erickson lied, then he had paid for the land in full, and Mrs. Erickson was not entitled to one cent. If, however, Mrs. Erickson told the truth, then Wiper still owed her the amount she recovered. Juries are doubtless at times influenced by passion or prejudice in cases involving injuries to person or character in such way as to return verdicts for excessive amounts. But it is hard to believe that twelve honest, intelligent men could or would be induced through sympathy to violate their oaths and take the defendant's money and give it to the plaintiff. The issue in this case was square cut. Did Mrs. Erickson tell the truth or did Wiper? The question of riches or poverty does not affect a person's veracity. If the trial judge was satis-

fied that the verdict was rendered under passion or prejudice, or in disregard of the evidence or the instructions, he had the right to set it aside. Comp. Laws 1913, § 7665. If the trial judge believed that there was any probable reason for granting a new trial, he could have requested such motion to be made before the appeal was taken. Comp. Laws 1913, § 7843. The jury and trial judge saw the parties and their witnesses, and heard their stories as given upon the witness stand. The jury by its verdict said the plaintiff told the truth. The trial judge (who is presumed to have done his duty) refused to interfere with the jury's findings.

We find no error in the record justifying a reversal. The judgment appealed from must therefore be affirmed. It is so ordered.

BURKE, J., dissenting. The majority opinion makes no attempt to justify or deny the miscarriage of justice presented by the record in this case; it lays the blame upon the shoulders of the jury, falling back upon the platitude that it is better for an innocent litigant to suffer than that the court should invade the province of the jury.

With this doctrine I have no quarrel, but there is another doctrine equally important, that the majority is overlooking, and that is that every man is entitled to a fair and impartial trial before a jury of his peers.

A trial of an issue of fact before a jury is a serious and solemn, if not a sacred, thing. It is the first duty of the trial judge to see that every litigant is accorded such a trial. The sooner trial courts recognize and assume this responsibility, the sooner will the world at large accord to the courts of this country the respect and confidence so essential to a well-governed country. One reason why courts suffer from the ridicule of the laymen at present is the occurrences of miscarriages of justice like the one before us. An examination of the evidence shows in brief the following facts: Erickson and his wife owed the bank something over \$1,200, some of it secured by a second mortgage upon his farm and some secured in other ways. The first mortgage against the land was \$2,000. There were unpaid interest and taxes upon this first mortgage, which made Erickson's total indebtedness run up pretty close to \$4,000. The undisputed evidence is that Wiper went to the farm to collect the money due the bank, and while there Mr. and Mrs. Wiper

tried to sell him the farm for \$5,000. Mrs. Erickson testifies that Wiper told Erickson that, if he did not quit drink, there would not be anything left on the farm, and she further testifies: "John (Erickson) wanted to sell the land because he wanted to go to Canada, and I said I have signed enough, but if you want to go to Canada I will sign the land if there is anything left in the land, and Mr. Wiper said he would figure it. He said there was a \$2,800 mortgage—. . . I said I wanted to have something to say in that land, for that homestead belongs to me just as much as to him. . . ." Wiper testifies that the sale was finally made for a consideration of \$4,000 for the quarter section, \$2,800 of which was the assumption of the first mortgage, interest, and taxes, something like \$1,000 due to the bank, and \$125 paid in cash to Erickson to allow him to go to Canada to look for another homestead. Upon that date he executed an instrument in writing, as follows:

July 22, 1911.

On payment to me of the sum of four thousand dollars (\$4,000) less the then encumbrances, I agree to convey to John Erickson of Coteau, N. D., by quitclaim deed the S. E. $\frac{1}{4}$ of sec. 23, 161-90, same being the amount I am taking said land over at to-day. I also agree to collect two promissory notes signed by John Erickson in favor of the First National Bank of Bowbells,—one for \$650 and one for \$154.65,—secured by said lien on lands owned and rented by John Erickson, and to pay to John Erickson any and all money due him from such collection after deducting amount necessary to pay me for advances necessary to make the land net me just \$4,000 after paying all taxes, and past-due interest, and any and all advances made to you up to and including cash paid at this date. Also all bills which I have guaranteed for you up to this date, which is \$48 to Rogers Lumber Company.

(Signed) A. C. Wiper.

Erickson went to Canada, where he died on the 22d of the following August. Plaintiff now brings this action, alleging an oral promise on the part of Mr. Wiper to pay to her all of the moneys above the first mortgage on the land, and claiming that the purchase price was \$5,000 in place of \$4,000. Her evidence consists of her own testimony. Mrs. Rouse, the only witness besides herself, in no manner supports Mrs. Erickson's version of the contract. The most casual examination of the evidence discloses the utter falsity of the testimony of both of those

witnesses. For instance, Mrs. Erickson testifies upon cross-examination that Mr. Wiper, the president of a solvent bank, had agreed to pay her personally in cash something over \$2,000 for joining with her husband in signing the deed, and yet admits that during a period of six months of the most extreme poverty and privation she never asked for this money, nor gave any intimation to any person living that she had this asset. During this time her husband had died in Canada, and was buried at the expense of the county, and she and her children had been receiving county aid. The utter improbability of such conduct on her part under those circumstances is plain enough without any elaboration from me. Mrs. Erickson is contradicted by the disinterested witness, Heath, the driver of the livery automobile, who heard the entire contract between Erickson and his wife and Wiper. She is also contradicted by her old-country friend, Dahlquist, who came with her to the bank on one occasion. He testifies that upon an occasion after the execution of the deed he went with Mrs. Erickson to the bank and heard a conversation between Mrs. Erickson and Wiper. He was asked to give the substance of it and replied: "A. Well the meaning, anyway, of it—if Mrs. Erickson or the family could get more than \$4,000, or whatever it was, they should get the profit. Wiper said he only wanted the money and did not want the land, and, 'what profit you can get out of it is yours,' he said."

When we remember that Dahlquist was her friend from the old country, upon whom she always relied for advice, and that he testifies that several months after she claimed to have received Wiper's promise to pay her \$5,000 for the place less \$2,800 mortgage, she was in the bank talking with Wiper, admitting that the purchase price was \$4,000, and that Wiper voluntarily offered to give her anything above that sum for which she might sell the farm, it is further almost unbelievable that Wiper would have made a promise to pay to her everything above the first mortgage on this farm, while the bank of which he is president had over \$1,200 coming from Erickson, \$400 of which was secured by a mortgage upon the farm itself.

As for the testimony of Mrs. Rouse, it need only be said that she did not hear the contract between Wiper and the Ericksons. That she was unscrupulous and untruthful appears from the testimony in many places. We will mention but one instance. She testifies that Mr.

Sinkler, Mrs. Erickson's attorney, was conducting her case without compensation, in order that justice might be done. The effect of such benevolence upon a jury can be readily imagined. An examination of the record, however, shows that brother Sinkler has filed the customary attorney's lien for one third of the judgment recovered.

Even at that, I agree with the majority that the case should have been submitted to the jury, but upon such testimony the strictest observance of the legal rule should be required. The trial court should keep the parties within the issue,—should accord to a bank the same consideration shown to a poverty-stricken widow. Justice should be blind. An examination of the record shows the most glaring violations of this simple rule. I will cite only one instance of the kind of testimony that reached this jury and had its effect, no doubt, upon the verdict. Mrs. Rouse volunteered the following: "This woman (Mrs. Erickson) came to me—I mean that we thought the boy was going to die, if we could not hold his home, and he sat there day after day with tears rolling down his face, and we thought he was dying, and she said to me, 'Save the home if it is possible to save it;' and that is what I mean, that we should try to save the home if it was possible to save it, and that is what I mean." In justice to the trial court it should be said that he immediately struck out this answer, but the harm had already been done, and, besides, such a voluntary statement shows, to my mind, that it was preconcerted. As another instance of the methods used to influence the jury against the defendant, we cite the following fact: Mrs. Erickson, as already stated, was cross-examined as to why she had allowed the county to bury her husband as a pauper, while she had over \$200 in cash coming from this rich banker. This was a perfectly proper question. It brought up the probability of her story. It was admitted for this purpose alone, and yet upon cross-examination in an argument plaintiff's counsel was allowed to shed tears over her sorry plight.

Again, she was asked upon cross-examination, why she did not write to Wiper, demanding this money. She replied that she could not write, and was asked whether or not she did not have children old enough to write. This was perfectly proper and was admissible for the single purpose of discrediting her when she said she had actually over \$200 coming. Any redirect examination should be confined to her reasons for not writing to Wiper, and yet counsel was allowed to show, in explana-

tion as he said, that she was the mother of eight children and that two of them were imbeciles.

We give a short extract:

Q. (By Mr. Sinkler) The oldest child,—can he talk?

(No answer).

Q. He doesn't know anything, does he?

A. No.

Q. Has he ever been able to help himself in any particular?

A. No.

It is conceded that, besides the two imbeciles, there were several other children who were well able to have written to Wiper, demanding the money. There can be little doubt that the parading of the two imbeciles before the jury was prejudicial, highly prejudicial, error. Again, in his address to the jury, counsel went outside of the evidence and offered his testimony, as follows:

"It is not to be wondered at, this gang from Bowbells are all here telling the same story for the purpose of robbing this woman."

"Defendant wanted to get the plaintiff into Canada, and the reason for wanting to get her there was to get her out of reach, so that he would not have a lawsuit."

He further stated that he could go across the road and sell the farm to Mrs. Rouse for \$4,500. Those remarks of counsel were all unsupported by the evidence, were duly excepted to by defendant, under the most elementary principles were prejudicial error. As it seems to me, from the beginning to the end of the trial, the poverty of plaintiff, her large family, and her imbecile children, were paraded before the jury. It was, of course, unfortunate that she was left in those circumstances by an intemperate husband. It was also unfortunate that the county was obliged to pay the burial expenses of her husband. Those are social and economic questions. The men who sold Erickson intoxicating liquor are more responsible than Wiper for this condition. None of those things, however, had the slightest bearing upon whether Wiper had promised to pay her \$200 in cash, while the bank of which he was president held Erickson's notes unpaid. The errors which I have enumerated

require a new trial upon the settled rules of law. For the foregoing reasons I am unable to concur in the affirmance.

Goss, J., dissenting. My dissent is not upon the issues passed upon by the jury or upon the conduct of the trial, but, in my opinion, plaintiff's recovery is and should be barred by the statute of frauds, and this, too, irrespective of pleading, as plaintiff recovers only upon a departure in proof from her cause of action as stated in the complaint. A cause of action is pleaded, based upon the release by a wife of her homestead right in real property owned by her husband, and seeks a recovery of an amount alleged as agreed to be paid her for such *release*. The complaint is very carefully and skilfully drawn, and is not vulnerable to demurrer. But it is on the proof that the *denouement* occurs, and the real purpose of the suit is then first disclosed to be indirectly a round-about one to recover not as for consideration for a *release*, as pleaded in the complaint, but instead of a portion of the very consideration for the deed given, and which consideration has been, in whole or large part, paid to the husband, grantor. The impossibility of a recovery by this plaintiff of a portion of the consideration, as *consideration* for the deed she and her husband signed to Wiper, is very apparent when it is remembered that the land conveyed belonged to the husband, title stood in his name; and he has died since the transfer. His estate, and not this plaintiff, must recover, if anyone possess a cause of action to recover for any balance of *purchase price* for this deed. But this does not purport to be to recover such purchase price, but is an action virtually by a third party, beneficiary of a trust, to recover of the trustee for her use. And this is attempted to be proven by parol, and to be ingrafted upon a deed of the husband, since deceased, to the defendant, and that, too, contrary to the terms of that deed, which was also signed by this plaintiff as a grantor. It seems to me that recovery cannot be had as for the consideration for the deed. In other words, this widow cannot recover in her own name and as her own cause of action any part of what was the purchase price, the consideration for the deed of her husband's homestead to Wiper. Assume that the purchase price for this land was to be \$5,000, instead of \$4,000, as claimed by Wiper, nevertheless that balance of purchase price, Erickson being dead, is due from Wiper to Erickson's estate, and not to Mrs. Erickson. And notwith-

standing her recovery in this case the administrator of Erickson's estate can sue and recover for any balance of said purchase price.

Bearing in mind that the complaint is for a cause of action founded upon a release of a homestead right or impediment, let us examine the proof as to how plaintiff has attempted to establish her cause of action upon this contract. The answer is a general denial, and puts plaintiff upon her proof. This she attempts to meet by showing that she has joined in the deed of her husband to Wiper, and testifying that before she did so Wiper had *orally* agreed with her to pay her "all there is over the mortgage, and the mortgage was \$2,800, . . . and I was supposed to have the rest and the land was \$5,000. He agreed to that, and after he agreed to that I signed the deed." "My husband said to Wiper, 'All I want is \$150, and the rest goes to my wife.'" All the consideration for the deed to the amount of \$4,000, claimed by Wiper to be the consideration therefor, was paid by defendant to the husband. She has recovered a judgment for a portion of the consideration paid him for this grant of *his* real estate, and a thousand dollars besides as a balance of *such consideration*. And this is all the proof. It is contended that by her joining in the deed she has partially performed the alleged parol contract that the money consideration should go to her; and thereby taken the transaction out from under the bar of the statute of frauds, permitting her to prove by parol testimony, and without any writing other than the deed, the collateral contract thereto under which the consideration moved to her as a releasor of her homestead interest; and this, too, in direct contravention of the terms of the deed wherein she has contracted and covenanted as and to be a grantor. The sole question is whether this proof answers the requirement of the statute of frauds.

Respondent admits that the deed, as such, cannot be varied by parol testimony, but has attempted to divert what is stipulated in the deed as consideration money therefor into a consideration for the collateral contract to be paid the plaintiff, not as consideration for the deed, but as payment for her release of homestead, and this on the plea that the consideration for a deed or other instrument can always be inquired into and shown whether the same may contradict the terms of the deed or not. Notes in 25 L.R.A.(N.S.) 1194-1211; 31 L.R.A. 234; 33 L.R.A.(N.S.) 84; and 8 R. C. L. 969-973. It is now almost elementary law that such parol evidence may be received to show the true consideration

for a conveyance. *Alsterberg v. Bennett*, 14 N. D. 596, 106 N. W. 49, and note in 68 L.R.A. 925. That a recitation of the receipt of the consideration can be overthrown by parol proof; that the nonpayment of the consideration or a part thereof can be shown under certain limitations; that an action will lie to recover consideration unpaid, notwithstanding the recitals in the deed that the same has been paid, and, under certain circumstances, that a third party whose debt has been agreed to be paid by the grantee as a part of the consideration for a deed from a grantor, can sue and recover. (But in such a case the deed, while evidencing the grant and the partial performance, does not affect such third party, as it is not his deed. It was not a consideration for his act, and he is not estopped.) About the only limit to an examination into the consideration for a deed (in the absence of fraud involved in a suit to vitiate the deed because thereof) is that the deed cannot be destroyed in effect and operation, but must remain a deed with a consideration. And while the amount of consideration, the manner of its payment, and to whom and when and where and how paid, may all be fully inquired into on parol testimony, yet any and all amounts paid as consideration must remain of the same nature; that is, as *consideration for the grant* and not something else. Every dollar that was paid or that was to be paid as consideration for this deed was consideration for the grant conclusively evidenced thereby, and were not payments partaking of a different *nature or kind*, such as payments for a release of a homestead or a leasehold interest, or any other interest in the land in this suit between one of the grantors, the wife, and the grantee. "One of the purposes of inserting the acknowledgment of a valuable consideration in a deed is to prevent the resulting of any use or trust to the grantor." Washb. Real Prop. § 2284. Plaintiff's very claim in suit is based upon her assertion that part of this money belongs to her and is to come from the grantee as a part of the consideration for the grant, and yet at the same time constitute the consideration for her release of homestead and with the property sold being that of her husband. Thus she seeks to establish, and must establish before she can recover, that the deed operated to make her the beneficiary of a trust for a part of the stipulated consideration, although she is one of the grantors. "A recital of consideration received when it occurs in a deed of grant is usually intended merely as a written acknowledgment of the distinct act of payment, being there inserted for

convenience. Hence, it is not an embodiment of an act *per se* written, and may be disputed like any other admission. . . . In general, then, it may be said that a recital of consideration received is like other admissions disputable so far as concerns the thing actually received, *but that so far as the terms of the contractual act are involved the writing must control whether it uses the term 'consideration' or not.*" Wigmore, Ev. § 2433. Thus the authority distinguishes, as do others, 8 R. C. L. 970; 6 Am. & Eng. Enc. Law, 775; East Line & R. River R. Co. v. Garrett, 52 Tex. 139; Kahn v. Kahn, 94 Tex. 114, at page 119, 58 S. W. 825, between the portion of the deed receipting for a consideration paid and the remainder stipulating the contract. And its importance is this: The deed must have as one of its necessary parts a consideration for the grant to negative a resulting trust. And the stipulated price or consideration is a part of the contractual act itself, the deed. This being so, that it is *consideration* is indisputable by parol testimony. This doctrine is reaverred in § 2283 of Washburn on Real Property: "It is not competent to prove that no consideration has been paid where one has been acknowledged in the deed, for the purpose of impeaching the validity of the deed, unless it is for the purpose of establishing fraud against the grantor. The true doctrine is stated in Grout v. Townsend, 2 Hill, 554, 557, that where a deed acknowledges a receipt of a consideration the grantor and all claiming under him are estopped from denying that one was paid, for the purpose of destroying the effect and operation of the deed, although they may disprove the payment for the purpose of recovering the consideration money. The design of the clause acknowledging payment of consideration is not to fix the precise amount paid, 'but to prevent a resulting trust in the grantee.'" Grant that this grantor plaintiff, who claims to recover as a releasor, contrary to the terms of her grant, in the words of the authority, "may disprove the payment for the purpose of recovering the consideration money," *she cannot make that which she has covenanted by the deed to be consideration for the deed something else; to wit, consideration for the collateral contract upon which she seeks to recover.* She could not recover, except as legal representative of her husband's estate, the title having been in him as grantor, for any portion of the purchase price unpaid. See also Devlin, Real Estate, § 830. The sum paid under this deed must remain as the purchase price for land conveyed by said deed as against the claim

of this grantor that it is something else. True, she seeks to assert this claim under the guise of investigating the consideration for the deed, but the fact of this necessity brands her position as untenable, and that the money she seeks was purchase money and cannot be recovered as for something else, the consideration for a different contract from that evidenced by the deed itself. The force of this reasoning is realized by the plaintiff's counsel, and he seeks to avoid its consequences very cleverly, but signally fails, because his client is not suing to recover as for the purchase price, to do which she must sue as the representative of her husband's estate. Reference is to page 13 of the brief, where counsel says: "The testimony of the plaintiff does not in any manner vary or tend to vary the terms of the deed. The consideration recited in the deed is \$5,000. The testimony simply determines the amount which is to go to each of the grantors." Amount of what and to whom? Consideration which "is to go to each of the grantors." But plaintiff does not sue as a grantor, because if she did she would be limited to a recovery upon and for the purchase price, the consideration for the purchase. This she has not sued for, because perforce she could not, except as *administratrix*. Respondent by his very argument shows the fallacy of his position. He himself thus distinguishes between consideration as to purchase price of this land and consideration for the release of the wife's homestead interest therein, which interest did not rise to the dignity of an estate in lands, but amounted to a mere impediment upon the power of alienation by the husband of the homestead transferred. *Kuhnert v. Conrad*, 6 N. D. 215, 69 N. W. 185; *Roberts v. Roberts*, 10 N. D. 535, 88 N. W. 289; and *Helgebye v. Dammen*, 13 N. D. 172, 100 N. W. 245. Again, counsel says: "The deed is silent as to how much money is to go to the husband and how much to the plaintiff." So, plaintiff would divert part of the *consideration* for the *grant*, belonging if existent to her husband's estate, to herself individually under this clever ruse adopted in both pleadings and proof. The one moment this fund is a part of the consideration for the deed; at the next instant it is consideration for something else, entirely different, the release of the homestead interest, with the deed but proof of partial performance of the alleged collateral oral agreement. The deed is full and complete evidence of an executed contract of purchase and sale of the real estate, with a specified consideration stipulated to be the consideration for the grant thereof, and as

having moved from the grantee to the grantors as such consideration, and for no other purposes. Counsel, however, has succeeded in making it serve a double purpose, to wit, consideration for the grant, a consideration paid; and, secondly, as consideration for the collateral oral contract to release, which consideration is wholly unpaid. And the taking of the consideration from the former and applying it as consideration under the latter agreement must operate to ignore the terms of the deed to the extent of the sum paid therefor, being the stipulated consideration for the grant. And if this reasoning can be applied to part of the avowed and admitted consideration for a deed, then all said consideration can thus be made by parol proof the consideration for one or several other collateral contracts. This widow might just as well have claimed the entire \$5,000, the contract consideration for the deed, as to claim that portion thereof she has recovered. The principle would be the same.

This dissent concedes that the wife's homestead estate, the necessity of her grant to which may allow her to thwart a sale by her refusal to join in the deed, may be a valid consideration for her release of it. She could have said to Wiper, as she did, and if he, with the concurrence of her husband, had agreed to pay her a portion of the purchase money in consideration of her release of the premises, he must pay her, but proof of such a contract cannot be made by the introduction of her deed, supplemented with oral proof contradicting the very terms of the deed itself. Every condition precedent to her deeding was merged in the deed, and it transferred the land, she joining therein, for the *purchase price, which must remain that purchase price*. By the introduction of the deed she has negatived the possibility of her making proof contradicting its terms by oral testimony, because thereunder she has sold property for a consideration, and she cannot be heard to say that she has not, but instead has sold thereby something entirely different. Because money was the consideration makes the case no different than had this defendant promised to deliver her a horse or a new bonnet if she would join in the deed. In such a case it could not be contended that any part of the consideration for the deed could then be diverted to and constitute the consideration for her release of homestead right. Nor *vice versa* could the consideration for the release be made to stand for the consideration for the deed, the grant. In such a case she would sue exactly as she has sued here, to recover the horse or the bonnet or

the value thereof, and as upon an independent contract collateral to, but entirely different from, the transfer evidenced by the deed, and she would not in such an event be compelled, in order to recover, to contradict the very terms of the deed as to consideration, as she is now seeking to do, and must do to prevail, even conceding that \$1,000 of the consideration for the deed remains unpaid, and which must be the property of her husband's estate, and not hers individually. The terms of the deed control in either event, unless her contract concerning the release be in writing. "Under the power of proving by parol the consideration of a written contract, you cannot establish an independent agreement otherwise within the statute of frauds," quoting from *Alsterberg v. Bennett*, 14 N. D. 596, at page 599, 106 N. W. 49, in turn quoting from opinion in *Howe v. Walker*, 4 Gray, 318.

This recovery is the best object lesson of the necessity for the statute of frauds, and emphasizes the reason why that statute was early known as the statute of "frauds and perjuries." If plaintiff prevails it is written, in effect, as the law of this commonwealth that the payment of consideration for a deed executed and acknowledged jointly by husband and wife and delivered to the grantee cannot be made without the grantee accepting the hazard of a suit at law to recover the entire amount of purchase price paid, or any part thereof that the wife may see fit to *orally* assert was to be paid her for her signature to the deed, but in release of her homestead interest. The door is thus opened wide to fraud, and remains a standing invitation to accomplish it through perjury. The purpose of the statute of frauds was to prevent this very thing. This recovery is a circumvention of it under the guise of the investigation of consideration in a deed, as was similarly attempted and condemned in *Alsterberg v. Bennett*, 14 N. D. 595, 106 N. W. 49, and whereby in practical effect the terms of the deed as to the *nature* of the money paid as consideration are varied, contradicted, and set at naught by oral proof. In my opinion this recovery cannot be sustained upon legal principles on the proof, and should be dismissed.

GEORGE A. SCOFIELD v. S. A. WILCOX.

(156 N. W. 918.)

Sheriff — salary — mileage — deputy — work performed by — mileage fees belong to deputy.

Construing § 3521 of the Compiled Laws of 1913, which provides that "in addition to the salary prescribed in the preceding section, the sheriff or his deputy or deputies shall be allowed ten cents per mile for each and every mile actually and necessarily traveled in the performance of their official duties," it is held that the 10 cents mileage belongs to the deputy, and not to the sheriff, where the work is done and the distance is actually and necessarily traveled, not by the sheriff, but by such deputy.

Opinion filed February 17, 1916. Rehearing denied March 13, 1916.

Appeal from the District Court of Renville County. *F. E. Fisk*, Special Judge. Action to recover from sheriff mileage collected by such sheriff for distance traveled by his deputy. Judgment for plaintiff. Defendant appeals.

Affirmed.

Grace & Bryans, for appellant.

The office of sheriff is on a salary basis, and all fees earned belong to the county, excepting mileage and livery hire. Comp. Laws 1913, § 3520.

The mileage allowed is 10 cents per mile actually and necessarily traveled. Comp. Laws 1913, § 3521.

The sheriff or his deputy is also allowed to charge not to exceed \$5 per day for livery hire. Comp. Laws 1913, § 3522.

All these mileage fees and *per diem* allowances belong to the sheriff, whether the work is performed by him in person or by one of his deputies. None of this work is done by an individual; whether by the sheriff or by a deputy, it is official work, done by and through such office, and all such fees and earnings belong to the sheriff, and not to the deputy who may perform the work, but in the sheriff's name. 35 Cyc. 1557; *Sargent v. La Plata County*, 21 Colo. 158, 40 Pac. 366; *Chicago & A. R. Co. v. Dunning*, 18 Ill. 494; *Chipman v. Wayne County Auditors*, 127 Mich. 490, 86 N. W. 1024.

This applies only to the mileage, because the *per diem* allowance is for an actual disbursement, and is presumed to be an expense, and not earnings, and covered by the statute as a reimbursement. 35 Cyc. 1593, under subdiv. "F;" Sargent v. La Plata County, 21 Colo. 158, 40 Pac. 369.

A deputy sheriff is not an official of the county—only as he acts in the name of the sheriff. Wilson v. Russell, 4 Dak. 376, 31 N. W. 649; Summerfield v. Sorrenson, 23 N. D. 460, 42 L.R.A.(N.S.) 877, 136 N. W. 938.

Francis J. Murphy, for respondent.

The sheriff is now limited to a specific salary. Under the present law his deputies are paid a salary by the county. Formerly, the appointment and compensation of deputies were purely matters of private arrangement between them and the sheriff. Comp. Laws 1913, §§ 3520–3526; Laws 1909, chap. 120; Comp. Laws 1913, §§ 701, 702; Rev. Codes 1905, §§ 433, 434.

The present law provides that the sheriff, or his deputy or deputies, shall be allowed 10 cents per mile for distance necessarily traveled in the performance of official duties. The sheriff is authorized to appoint special deputies in cases of emergency, and the law fixes their pay at \$3 per day, plus the same mileage as is allowed regular deputies, to be paid by the county. Comp. Laws 1913, §§ 3520–3526.

The following cases cited by counsel for appellant have no application. They only relate to the question of the power of a deputy to act in his own name. Wilson v. Russell, 4 Dak. 376, 31 N. W. 649; Summerville v. Sorrenson, 23 N. D. 460, 42 L.R.A.(N.S.) 877, 136 N. W. 938.

BRUCE, J. The only question in this case is whether under the provisions of §§ 3520–3525 of the Compiled Laws of 1913, a sheriff is entitled to keep for himself the mileage paid for the distance traveled in the performance of the official duties of his deputy, or whether such mileage belongs to the deputy, and to the deputy alone.

The plaintiff in this case traveled 6,179 miles while in the employ of the sheriff as deputy, and the defendant sheriff allowed and paid him all his expenses such as livery hire, gasoline, and other expenses, but collected and retained for himself the 10 cents per mile which is allowed by § 3521 of the Compiled Laws of 1913.

Section 3521 of the Compiled Laws of 1913 provides: "In addition to the salary prescribed in the preceding section the sheriff or his deputy or deputies shall be allowed 10 cents per mile for each and every mile actually and necessarily traveled in the performance of their official duties." It would appear from the wording of the section that the deputy, and not the sheriff, is entitled to this mileage. Counsel for appellant, however, argues that there is no such office as that of deputy sheriff; that "the deputy is not an officer of the county, but is employed by the sheriff as his deputy, and the county paid him as such deputy the sum of \$90 per month for his services. Therefore he is the deputy of the sheriff and working for the sheriff, and the fees that he might make in the office would be handed to the sheriff, and the sheriff would pay them into the county, together with his fees, and any mileage that he might make would be made for the sheriff, and the sheriff would collect them and retain them as his mileage fees." In support of this proposition he cites *Wilson v. Russell*, 4 Dak. 376, 31 N. W. 649, and might also have cited *Summerville v. Sorrenson*, 23 N. D. 460, 42 L.R.A. (N.S.) 877, 136 N. W. 938.

We do not believe, however, that he is correct in his contention. The cases cited merely hold that the official acts of a deputy sheriff are the acts of the sheriff, and that as an officer he is not known to the law. They fall far short of holding, however, that he is not to a certain extent a public employee, and that the public has not the right to fix his compensation and his emoluments.

That the legislature has done this, and that this is its intention, there can be but little question. Not only is the language of § 3521 of the Compiled Laws of 1913 clear upon its face, but the deputy sheriff is specifically recognized as an employee of the state or county, and not of the sheriff, by the fact that his salary is fixed by the legislature, which has provided that he shall be paid, not by the sheriff, but out of the public funds. See Comp. Laws 1913, § 3523. In commissioner districts that compensation is to be fixed by the commissioners at not less than \$60 nor more than \$100 per month, except in counties of more than 33,000 inhabitants, where the salary is fixed at \$125 per month. It is true that such deputy is appointed by the sheriff, but a resolution of the board of county commissioners is a prerequisite to such appointment, at any rate if the public funds are sought to be resorted to. It is

also true that in these commissioner districts where a salaried deputy is not located or provided for, it is the duty of the sheriff to appoint at least one deputy without any such resolution, but the statute strictly fixes his compensation, and it is noticeable that such compensation is fixed at "such mileage and livery fees only as are now provided by law." In addition to this, § 3524 provides that "in case of any emergency the sheriff shall have the authority to appoint and qualify special deputies in such numbers as, in his judgment, the conditions may require, and each of such special deputies shall receive as compensation for *his services* the sum of \$3 per day and *the same mileage as allowed to regular deputies*, to be paid by the county. The sheriff shall have the sole power of appointing and removing them at pleasure." The language of these two sections must be taken into consideration when construing § 3521, and no one can read them without coming to the conclusion that not only was the deputy sheriff considered by the legislature as a public employee, but that the mileage was considered and provided as a means of compensation to him and to him alone. The closing paragraph of § 3523 says: "Whose compensation shall be such mileage and livery fees only as are now provided by law," while in § 3524 we find the words: "And . . . such special deputy shall receive as compensation for his services the sum of \$3 per day and *the same mileage as allowed to regular deputies* to be paid by the county."

When using the words, "as allowed to regular deputies," the legislature must be deemed to have spoken advisedly, and to have given their own construction to § 3521, which was part of the same general act. (Chapter 275 of the Laws of 1911.) They said: "Allowed to regular deputies." They did not say: "Allowed to the sheriff for the work and travel of his deputies."

We are satisfied that the deputy is entitled to the mileage of 10 cents per mile for the distance actually and necessarily traveled, and that the judgment of the district court should be affirmed. In coming to this conclusion we are not only stating our own opinions, but that expressed by the legal department of this state in at least three written opinions. One of these opinions was filed on January 10, 1913, and signed by Assistant Attorney General C. L. Young; another was filed on January 12, 1914, and was signed by Attorney General Andrew Miller. The other was filed on November 7, 1913, and was signed by Assistant

Attorney General John Carmody and Assistant Attorney General Alfred Zuger concurring.

All of these opinions came to the same conclusion that we have reached in so far as the question as to whom the *mileage* belongs, and it is a fact worth noticing that all of them were filed in ample time for the legislature to have expressed itself upon the matter at the 1915 session if the opinions as filed misstated its intention. See Biannual Report of Attorney General for 1913-1914, pages 175, 177 and 181.

The judgment of the District Court is affirmed.

Goss, J., dissenting. I believe the legislature never intended to place deputy sheriffs, receiving the salary provided from the county, as co-ordinate officers with their principal and entitled to the mileage. That has always gone with the office to the officeholder, the principal. The main opinion quotes but a portion of the statute. It is significant that the statute discriminates between salary and mileage, and intentionally so. Both the sheriff and his deputies are paid a salary from the county. That signifies nothing as to mileage, a separate matter. From the salary provisions alone it cannot be said that the mileage is not a perquisite of the office of sheriff. It always has been, and the mere change of the office from a fee paid office to a salary and fee paid office signifies nothing as to mileage, which is a charge in the nature of fees. For years before this statute the sheriff's office, and the sheriff as the incumbent thereof, received remuneration from various sources, among them fees for service of papers now turned over to the county; another item of income was livery hire, a recognized taxable charge wholly independent of mileage and in the nature of a repayment for disbursements incurred, but in reality, as is a matter of common knowledge, a considerable source of income over disbursements; another source of revenue to the office and its incumbent was mileage at 10 cents per mile for travel. Whether collected of private citizens for service of papers or of the county in criminal matters, this has always gone heretofore to the sheriff, and not to the deputies, except as the principal might consent or apportion to them such part of mileage earned by them as he might see fit to allow his deputies as a remuneration. Then, too, every act of the deputy to be an official act must be done in the name of the sheriff and constitute the sheriff's act alone. In law the deputy could not act independent

of the principal, or except as his act constituted that of the principal. Hence he was not required to give a bond as a public officer to the county or the state, but instead, recognizing the principal's liability for the deputy's acts, the principal is empowered, but not required, to accept the deputy's bond to himself individually merely, as indemnity to him for acts committed by the deputy in his name, or for which he, the principal, is responsible. Likewise every bill for mileage or disbursements incurred by the deputy, and otherwise a valid charge against the county or an individual, must be charged in the name of and as the charge of the principal against the county or the individual, and for which charge the sheriff or his bond is liable if the same be invalid. In all such matters such an officer as a deputy sheriff is unknown to the law, and it still is nonexistent, except as to salary and compensation. It is a mere employment. The incumbent is but the deputy, the agent if you please, the other self of the principal, the sheriff; but yet under the holding of the majority, an ambiguous statute is so construed as to fail to recognize the effect of well-known facts and principles of law, and turn over to the deputy of the sheriff mileage accruing as a recompense to the sheriff's office. If the mileage belongs to the deputy simply because he performed his principal's duties as a deputy of the principal, then consistency in reasoning requires that he, though not an officer and but a mere deputy of an officer, shall nevertheless present his bill for mileage to the county commissioners, regardless of the approval or disapproval of the principal in the performance of whose duties the mileage was incurred, and would constitute the same a charge in favor of the deputy individually and against the county, and to be paid not by the county to the sheriff's office, but to the individual who happened to be deputy of a sheriff and performed the travel. And this, too, when such individual making the charge has no bond to the county to insure against overcharge or inflation of bills on his part. The county, therefore, being obliged to pay him independent of any act of approval or disapproval; from the sheriff, the latter can escape responsibility for the acts of his deputy, something never dreamed of and sufficient in itself to condemn as unsound the opinion of the majority in this case. The tendency of all government is to, in every instance, have responsibility fixed upon a responsible head. This decision flies in the teeth of this principle.

Nor is it enough to say that the statute can be read to support the

opinion as written. It is the legislative intent that is the inquiry, to be determined under the known usage and custom theretofore prevailing in the sheriff's office concerning the matters covered by the legislation in question. And when so considered and the whole statute read together, it is wholly unnecessary (1) to assume that the deputy of this particular officer should be considered as an independent official possessing rights of compensation from the income of the office of his principal, and to that extent co-ordinate and independent of the principal, as illustrated by this suit by the deputy against the principal for a portion of the income of that office under a claim of individual ownership of it; and (2) it is wholly unnecessary to assume that, because the statutes have in terms authorized a charge by the deputies as well as the sheriff of mileage, that it was thereby intended to do more than to empower the deputy to make such a charge in the name of his principal and for the office. On the contrary, the opinion assumes that because the deputies are authorized to charge, by the language "shall be allowed 10 cents per mile for each and every mile actually and necessarily traveled in the performance of any of their official duties," that they thereby own and can appropriate such mileage to themselves. No other deputy of any county official, though authorized to charge, can thus assume ownership of the funds of his principal. It is true that by chapter 270 of the Session Laws of 1913 the legislature amended the 1911 statute to provide for the appointment of other than salaried deputies. Certainly until this amendment, it could not be said that deputies were entitled to mileage as against their principal. The portion of that statute emphasized in the majority opinion as all controlling reads: "Provided that the sheriff shall appoint in each commissioner district of his county, except in commissioner districts where a salaried deputy is located, at least one deputy whose compensation shall be such mileage and livery fees only as are now provided by law." The reason for this amendment is easy to find. The primary object uppermost in the legislative mind was that there should be one deputy in each commissioner district to keep down mileage and for the convenience of its citizens. Recognizing that salaried deputies could not be appointed from each commissioner district, this provision for compensation was made for the nonsalaried ones residing away from the county seat, and they were given "such mileage and livery fees only as are now provided by law." The purpose of this

provision was twofold, to prevent their getting a salary as some other deputies were paid, and still at the same time give them some remuneration, was the intent. There is nothing in this from which it must be said, or must follow, that the salaried deputies must be used the same way and be permitted to appropriate the mileage coming to the sheriff's office, simply because they have performed the duties of that office by travel while upon a salary from the county. If presumptions are to be indulged in on this question, the natural one would seem to be in accord with the plain English of the act, that the legislature has purposely distinguished between deputies and created salaried and nonsalaried deputies, the former recompensed by the county, the latter by mileage and livery fees. If it can be inferred that because the nonsalaried deputies are entitled to mileage, that the salaried ones must be, the same reasons would say that the salaried deputies are entitled to livery fees of the sheriff's office as well as mileage, even though the principal furnished the automobile or livery with which the mileage was earned. If it be said that this cannot be because livery can be no more than a mere recompense for disbursements, the reply is that by the statute itself it is denominated "fees" by the following words, "at least one deputy, whose compensation shall be such mileage and livery fees only as are now provided by law." The legislature has thus recognized that the livery bill allowed on the mileage basis may contain more than disbursements, and may amount to fees. If the mileage goes to the salaried deputy simply because the unsalaried one is so recompensed, the "*livery fees*" go by the same proviso to the deputy. But nothing of the kind was intended, and the foregoing but illustrates the fallacy of the reasoning and unsoundness of the majority opinion in construing these acts with no reference to the practice I believe to have prevailed in the various offices of sheriff in the many counties of this state. This deputy suing was a salaried one under the stipulation, and earned this mileage in performing the duties of the office of his principal, and in my opinion the mileage belongs to the principal, and not to the deputy. The contrary holding of the majority invites a lawsuit against not only the sheriffs, but the county as well, by every discharged or disgruntled deputy sheriff. It is a standing invitation for every deputy to present bills in his own name against the counties, who must deal with him, a mere employee, on the basis of an official, but without a bond. It permits every sheriff

to disclaim responsibility on his bond every time his deputy desires to mulct the county for mileage. It changes the relation of the deputy to his principal, making him to a large extent independent of the official at whose pleasure he holds his office. All this was never intended, and should not be held as the declared intent of the legislature if the statutes are ambiguous; and to my mind they are. The question is not free from doubt, except when viewed in the light of the conduct of the particular office prior to these statutes, when it would seem to be plain. The holding should be the other way, and this case should be reversed. I am authorized to say that Justice Burke concurs in this dissent.

BERGEN TOWNSHIP et al. v. NELSON COUNTY et al.

(156 N. W. 559.)

Amended complaint — trial court — order of striking out — appealable.

1. Following *Stimson v. Stimson*, 30 N. D. 78, it is *held* that an order striking an amended complaint from the files is appealable.

Drain commissioners — board of — functions and powers — drains — public good — benefits — cost.

2. The board of drain commissioners is the tribunal created by the legislature to determine, upon petition and pursuant to notice, whether the public good requires a proposed drain to be constructed, and whether the cost of construction will exceed the amount of benefits to be derived therefrom; and also to determine what lands are benefited by the construction of the drain, and to apportion the cost thereof according to benefits.

Board of drain commissioners — procedure — statutory requirements — determination of — court not to inquire into — fraud — equitable interference.

3. When the board of drain commissioners have, in all things, proceeded in accordance with the statutory requirements, their action is final, and the courts will not inquire into the correctness of their determination upon questions within their jurisdiction, unless such determination is assailed for fraud, or other ground for equitable interference.

Equity — court or tribunal — judgment or determination of — relief — complaint — sufficiency of — fraud — specific facts constituting.

4. Where a party seeks the aid of equity in relieving against a judgment or determination of a court or tribunal on the ground of fraud, it is not sufficient

to incorporate in the complaint a general allegation of fraud, but the specific facts constituting the alleged fraud must be set forth.

Amended complaint — two causes of action — new cause — original cause — departure from — striking out — order of court.

5. An amended complaint setting forth two causes of action, the first cause of action being new, and a departure from the original cause of action, and the second cause of action being substantially a repetition of the former complaint, which had been held bad on demurrer, is properly stricken out.

Opinion filed December 28, 1915. Rehearing denied January 15, 1916.

Appeal from an order of the District Court of Nelson County,
Cooley, J. Plaintiffs appeal.

Affirmed.

Robinson & Lemke, for appellants.

The rule is that when an unauthorized amendment is stricken out, the parties are left in their former position. *Bryant*, Code Pl. § 231; *Frank v. Bush*, 63 How. Pr. 282.

A motion for an order must state the relief sought, and the order must be limited to the relief specified. The motion here was made too late, in any event. *Barker v. Cook*, 40 Barb. 254; *Bowman v. Sheldon*, 5 Sandf. 657; District Ct. Rule No. 34; *Bryant*, Code Pl. § 231; *Hollister v. Livingston*, 9 How. Pr. 140; *Follower v. Laughlin*, 12 Abb. Pr. 105.

The party on whom service of a paper is made is deemed to have waived all objections, unless same is returned as the rule provides. District Ct. Rule, 34; *Lewis v. Graham*, 16 Abb. Pr. 126; *Perkins v. Mead*, 22 How. Pr. 476.

An amendment to a complaint which states the same cause of action as in the original pleading disclosed, and then introduces a new or different cause of action, is not objectionable. This is especially true where each substantially charges the same cause or related to the same subject-matter. *Finlayson v. Peterson*, 11 N. D. 46, 89 N. W. 855; *Kerr v. Grand Forks*, 15 N. D. 294, 107 N. W. 197.

“Or the amendment may add a new cause of action or substitute another cause of action belonging to a different class.” 1 Abbott, Pl. 9; *Brown v. Leigh*, 49 N. Y. 78; *Deyo v. Morss*, 144 N. Y. 216, 39 N. E.

81; McKeighan v. Hopkins, 19 Neb. 33, 26 N. W. 615; Esch v. Home Ins. Co. 78 Iowa, 334, 16 Am. St. Rep. 443, 43 N. W. 229.

Or a cause of action which could have been united with the original cause may be added by amendment. Freeman v. Webb, 21 Neb. 160, 31 N. W. 656; Omaha & R. Valley R. Co. v. Moschel, 38 Neb. 281, 56 N. W. 875; Homan v. Hellman, 35 Neb. 414, 53 N. W. 369.

The test is, Does the amendment present a new and different subject of controversy? Gensler v. Nicholas, 151 Mich. 529, 115 N. W. 458, 14 Ann. Cas. 452; Myers v. Moore, 78 Neb. 448, 110 N. W. 989; Gates v. Paul, 117 Wis. 170, 94 N. W. 58.

Frich & Kelly, for respondents.

CHRISTIANSON, J. This action involves a drainage project in Nelson county. The specific relief demanded in the complaint is that the special assessments levied for the construction of such drain be canceled and annulled, and all proceedings in regard thereto adjudged null and void, and the defendants enjoined from further attempting to construct such drain or levy any special assessment therefor. The action was commenced on February 19, 1915. The original complaint was superseded by an amended complaint. The defendants demurred to such amended complaint on various grounds. On May 4, 1915, the district court entered an order sustaining the demurrer with leave to the plaintiffs to serve an amended complaint within twenty days. An amended complaint was subsequently served in accordance with the leave so granted. The amended complaint so served set forth two causes of action. The first cause of action merely alleged that plaintiffs have an estate and interest in certain lands, and that defendants claim certain estates in or liens upon such lands, adverse to plaintiffs, and that such adverse claims are based upon pretended drainage warrants and special assessments. The second cause of action repeats the allegations contained in the first cause of action, and also alleges the commencement and partial construction of the drain and the levy of special assessments against the lands of the plaintiffs. The second cause of action was in effect a reavement of the matters set forth in the complaint to which the demurrer had been sustained. Defendants' counsel moved to strike such complaint from the files. The motion is not before us, and is not contained in the record submitted to this court. After hearing, the trial

court entered an order directing that the amended complaint be stricken from the files and the action dismissed without prejudice.

Respondents' counsel has moved to dismiss the appeal on the ground that the order is not appealable. It is true, an order dismissing an action is not appealable. *Larson v. Walker*, 17 N. D. 247, 115 N. W. 838. But an order striking a complaint is appealable. *Stimson v. Stimson*, 30 N. D. 78, 152 N. W. 132. If a complaint is stricken from the files without leave to serve an amended complaint, it in effect amounts to a dismissal or termination of the action. This, however, does not render the order striking the complaint from the files nonappealable. See C. J. § 316, p. 489. The order appealed from in this case purports to be, and is, an order striking the complaint from the files, and hence is an appealable order. See *Stimson v. Stimson*, *supra*. The motion to dismiss the appeal is therefore denied.

This brings us to a consideration of the merits of the order appealed from. There is no claim that the proceedings before the drain commissioners were invalid for failure to comply with all the statutory requirements. The action is predicated upon the theory that the drain "is of no possible benefit to the plaintiffs and adds nothing to the value of the land; that the proposed drain is needless, and that the cost of construction greatly exceeds the estimated cost before the construction was commenced." The complaint states that part of the ditch has been constructed (but the contractors performing the work are not made parties defendant), and charges that the defendants "fraudulently" entered on the lands and constructed the ditch, and "fraudulently" levied assessments; and "fraudulently" caused notice offering drainage bonds for sale to be published. No acts constituting actual fraud are alleged, and on oral argument, appellants' counsel disclaimed any intention to charge actual fraud, but contended that the acts of the drain commissioners in (1) constructing the drain at an expense exceeding the estimated cost, and (2) assessing drainage assessments against plaintiffs' lands in excess of the benefit received from the construction of the drain, —constitutes fraud as a matter of law.

The board of drain commissioners is the tribunal created by the laws of this state to determine, upon petition and pursuant to notice, whether the public good requires a proposed drain to be constructed. (Comp. Laws 1913, § 2464); and also whether the construction of the proposed

drain will cost more than the amount of benefits to be derived therefrom. (Comp. Laws 1913, § 2465). The board of drain commissioners is, also, expressly created a tribunal to determine what lands are benefited by the construction of drains, and to apportion the cost thereof according to benefits. (Comp. Laws 1913, §§ 2468, 2470, 2474, 2476 et seq.) The power of the legislature to confer this authority upon the drain commissioners has been upheld both by this court and the Supreme Court of the United States. *Soliah v. Carmack*, 17 N. D. 393, 117 N. W. 125, 222 U. S. 522, 56 L. ed. 294, 32 Sup. Ct. Rep. 103. Where a party seeks the aid of equity in relieving against a judgment or determination of a court or tribunal on the ground of fraud, it is not sufficient to incorporate in the bill or complaint a general allegation of fraud, deceit, or misconduct, but the specific facts constituting the alleged fraud must be set forth particularly. See, 16 Cyc. 231; 23 Cyc. 1041; 22 Cyc. 929; 37 Cyc. 1275. The facts on which appellants base their claim for equitable relief would not establish fraud, but would merely establish errors of judgment on the part of the drain commissioners. Errors of judgment do not constitute fraud, nor do they constitute grounds for equitable relief.

In *Erickson v. Cass County*, 11 N. D. 494, 507, 92 N. W. 841, this court said: "If the facts are as appellants claim they merely establish errors of judgment in the tribunal clothed with authority to pass upon the question of benefits. The legislature had the undoubted power to commit to the drainage board the ascertainment of the lands to be assessed, as well as the apportionment of benefits; and it is well settled that the decisions of such boards on questions within their jurisdiction are not open to collateral attack and, 'if not corrected by some of the modes pointed out by statute, they are conclusive, whatever errors may have been committed in the assessment.'"

And in *State ex rel. Dorgan v. Fisk*, 15 N. D. 219, 226, 107 N. W. 191, this court also said: "The lack of jurisdiction is urged solely on the ground of an abuse of discretion or fraud in assessing benefits, and not on account of any irregularity in the proceedings. In this case, it is the claim that jurisdiction was exceeded after having been regularly acquired. We do not think the case is brought within the rule applicable to cases where there is an excess of jurisdiction. The statute imposes upon the board the duty to assess benefits. A review is provided for and

a hearing granted, where evidence may be produced. The board acts judicially in assessing benefits. The board is acting under a delegation of power from the legislature in respect to local affairs, but in the exercise of that power is exercising functions in their nature judicial. *Stone v. Little Yellow Drainage Dist.* 118 Wis. 388, 95 N. W. 405; *Dodge County v. Acom*, 72 Neb. 71, 100 N. W. 136; *Erickson v. Cass County*, supra. The statute not having provided for an appeal nor for a review by any other body, court or tribunal, its action is final, unless attacked for fraud. . . .

"The objectors in this case claimed that their lands are all drained naturally. It is not necessary to consider whether these contentions are sustained or not. Their determination will not affect the question of the jurisdiction of the drainage board to determine them. These questions were rightfully before that board for decision, and its determination will not be disturbed on the sole ground that it was an erroneous decision. The statute not having given an appeal, and nothing having been shown to warrant interference by a court of equity, and the jurisdiction of the board being complete, the action of the board is final and beyond review in an equitable action or in any other manner." See, also, *Turnquist v. Cass County Drain Comrs.* 11 N. D. 514, 92 N. W. 852; *Alstad v. Sim*, 15 N. D. 629, 109 N. W. 66; *Hackney v. Elliott*, 23 N. D. 373, 137 N. W. 433; *Ellison v. La Moure*, 30 N. D. 43, 151 N. W. 988.

Appellants' counsel virtually concedes that the complaint was insufficient under the former decisions of this court. But he argues earnestly that the present drainage law as construed in those decisions is productive of hardship and oppression, and that therefore such construction should no longer prevail. We are unable to agree with appellants' counsel. The courts are not concerned with the wisdom of legislative enactments. That is purely a matter for the lawmaking body. The duty (and power) of the courts is to interpret laws,—not to make them. If the present drainage laws are unjust or unwise they must be changed through legislative enactment.

In November, 1902, this court in the case of *Erickson v. Cass County*, 11 N. D. 494, 507, 92 N. W. 841, held that the legislature had the constitutional power to confer upon the drain commissioners the authority to determine such questions; and that the determination of the drain

commissioners upon questions within their jurisdiction (in absence of allegations and proof that they acted fraudulently) is conclusive, and that the courts will not inquire into or review the correctness of their determination on such questions. That has been the law of this state ever since. And the people, speaking through their lawmaking body (the legislature), have not seen fit to restrict the powers or curtail the authority of the drain commissioners. If this court should adopt the construction contended for by appellants' counsel, it would hardly be performing its constitutional function, but would by judicial fiat radically amend the present drainage laws of this state as adopted by the legislature and construed by the courts for the past thirteen years. This we decline to do. The legislature has designated the board of drain commissioners as the proper tribunal to determine the questions which appellants' counsel asks the courts to determine. The trial court properly sustained the demurrer to the first complaint.

The complaint stricken from the files purported to set forth two causes of action. That part of the complaint designated the first cause of action, construed by itself, is obviously an attempt to state a statutory cause of action to determine adverse claims. If so construed, it is a departure from the complaint to which the demurrer was sustained, and states a new cause of action wholly variant from the former complaint. This being so, the first cause of action was properly stricken.

The second cause of action was substantially a repetition of the complaint which had been held bad on demurrer. No new grounds or facts justifying equitable relief were set forth. The second cause of action was therefore also properly stricken. If the complaint be construed as a whole, it is merely a reavement of the allegations contained in the complaint to which a demurrer had been properly sustained. In any event the trial court was justified in ordering the complaint stricken. 31 Cyc. 617, 618. See also 3 Cyc. 452 et seq.

The order appealed from is affirmed.

ALBERT O. ROSENWATER and David Rosenwater v. I. S.
SELLESETH.

(156 N. W. 540.)

Action in equity — mercantile corporation — sale of interest in — insurance — fire loss — creditors — rescission of contract — delay in making — deeds — cancelation of — real estate — reconveyance — remedy — action for damages.

Action in equity to rescind an executed sale of a half interest in a mercantile corporation for the purchase of which plaintiff had deeded a half section of land, and to cancel deed or compel reconveyance. In February, 1911, plaintiffs purchased, and later, in April, took possession of the mercantile business, managing it until November, when the store building and stock of merchandise were totally destroyed by fire. Fourteen thousand seven hundred dollars insurance was collected and disbursed in payment of creditors, not paying the corporate debts in full. The business was closed out. While they were running the store, goods were bought and sold. A portion of the stock had been removed to start a branch store, for which corporate debts had been incurred. In July, 1912, a year and a half after the sale, plaintiffs served notice of rescission of the contract on the ground of fraudulent misrepresentations made by and inducing their purchase, claiming that, unknown to plaintiffs, the corporation had been insolvent when they bought their half interest in it.

Held: It was impossible to place the parties in approximately the *status quo* at the time of the sale on account of the destruction of the business by fire and the disbursement of the assets. This coupled with long delay in attempted rescission prevents any rescission. Plaintiffs cannot maintain an action to cancel the deeds or compel reconveyance of the real estate, but must be left to an action for damages.

Opinion filed February 4, 1916.

From a judgment of the District Court of Burke County, *Leighton, J.*, defendant appeals.

Reversed.

Geo. A. McGee and *F. B. Lambert*, for appellants.

Upon a sale of a stock of goods, if both parties have the same opportunity to examine the goods, neither can recover for fraud. *Smith, Fraud, § 75.*

Failure to exercise ordinary care to avoid deceit will prevent recovery, and a recovery is barred by an opportunity to examine the property. Diligence is required of all parties. Smith, Fraud, §§ 3, 4, 61, 75, 85, 86, 205; 2 Pom. Eq. Jur. §§ 892, 893; Brown v. Leach, 107 Mass. 364.

Many cases lay down the rule that if means of knowledge are at hand and equally available to both parties, the buyer will not be heard to say he has been deceived. 35 Cyc. 74; Chrysler v. Canaday, 90 N. Y. 272, 43 Am. Rep. 166; Hill v. Bush, 19 Ark. 522; Van Velsor v. Seeberger, 35 Ill. App. 598; Wightman v. Tucker, 50 Ill. App. 75; Cagney v. Cuson, 77 Ind. 494; Salem India Rubber Co. v. Adams, 23 Pick. 256.

A party claiming the right to rescind a contract must act promptly upon discovery of the fraud claimed, or he will be deemed to have waived any right to rescind. Comp. Laws 1913, §§ 5934, 5936; Raymond v. Eddebrock, 15 N. D. 231, 107 N. W. 194.

"A right to rescind is waived by any inexcusable failure to act for a period of fifteen months." Smith v. Detroit & D. Gold Min. Co. 17 S. D. 413, 97 N. W. 17; Bailey v. Fox, 78 Cal. 389, 20 Pac. 868; Gamble v. Tripp, 99 Cal. 223, 33 Pac. 851.

A delay of six weeks, without good reason, or unexplained, will raise a waiver. Rosenfield v. Swenson, 45 Minn. 190, 47 N. W. 718.

Rescission must be made promptly. Spoonheim v. Spoonheim, 14 N. D. 380, 104 N. W. 845; Annis v. Burnham, 15 N. D. 577, 108 N. W. 549; 2 Pom. Eq. Jur. § 917; Marten v. Paul O. Burns Wine Co. 99 Cal. 355, 33 Pac. 1107; 4 Thomp. Corp. § 4154.

Plaintiffs have never restored or offered to restore the consideration for the contract which they seek to rescind. This is necessary. Smith, Fraud, § 138; 8 Century Dig. Am. ed. cols. 1804, 1806; 43 Century Dig. cols. 466, 472; Lovell v. McCaughey, 8 S. D. 471, 66 N. W. 1085; Johnson v. Burnside, 3 S. D. 230, 52 N. W. 1057; L. J. Owens Co. v. Doughty, 16 N. D. 10, 110 N. W. 78; Houghton Implement Co. v. Vavrosky, 15 N. D. 308, 109 N. W. 1024; Sullivan v. Bromley, 26 S. D. 147, 128 N. W. 586; 6 Pom. Eq. Jur. § 688.

The rule of *caveat emptor* applies. Smith, Fraud, § 171.

Where there are no confidential relations, and the parties deal at arm's length, there is no duty that devolves on the seller to disclose facts which each has an equal opportunity to ascertain. Smith, Fraud, § 21.

Plaintiffs have put the property which they obtained in such position

that they cannot restore same to defendant. They, by their own acts, have brought this condition into existence. *Tarkington v. Purvis*, 128 Ind. 184, 9 L.R.A. 607, 25 N. E. 879; *Wright v. Dickinson*, 67 Mich. 580, 11 Am. St. Rep. 602, 35 N. W. 164; *Sportsman Shot Co. v. American Shot & Lead Co.* 11 Ohio Dec. Reprint, 821; *Bailey v. Fox*, 78 Cal. 389, 20 Pac. 868; *Brown v. Duplantier*, 1 Mart. N. S. 312; *Ledoux v. Armor*, 4 Rob. (La.) 381; *Richard v. Parrott*, 3 Rob. (La.) 75; *Peterson v. Burn*, 3 La. Ann. 655; *Horn v. Buck*, 48 Md. 358; *Carter v. Walker*, 2 Rich. L. 40; *Hoadley v. House*, 32 Vt. 179, 67 Am. Dec. 167; *McCrillis v. Carlton*, 37 Vt. 139, 86 Am. Dec. 700; *Chesley v. Soo Lignite Coal Co.* 19 N. D. 18, 121 N. W. 73; *Smith v. Brittenham*, 98 Ill. 188.

"Where a buyer exercises acts of ownership over the goods, as by selling a number of them, he cannot thereafter rescind." *Wolf v. Dietzsch*, 75 Ill. 205; *Cahen v. Platt*, 9 Jones & S. 483; 2 Pom. Eq. Jur. §§ 897, 965; *Marten v. Paul O. Burns Wine Co.* 99 Cal. 355, 33 Pac. 1107; 4 *Thomp. Corp.* § 4154.

Fraud must be established by clear and convincing evidence. *Richards v. Millard*, 146 Wis. 552, 131 N. W. 365.

It is never presumed. *Barrie v. Frost*, 105 Ill. App. 187.

E. R. Sinkler and M. O. Eide, for respondents.

The complaint in this action, tested by the strictest rules of pleading, is sufficient. It has not been attacked by demurrer, neither was it assailed by objection to the offer of evidence at the trial, under it. But the findings and judgment cure any defect, if in truth any existed. This is an action for false representations as to the value of a stock of goods. The questions of equal opportunity to examine, and of waiver, are not involved. *Liland v. Tweto*, 19 N. D. 551, 125 N. W. 1032; *Notes to Hedin v. Minneapolis Medical & S. Institute*, 35 L.R.A. 424; and *Fargo Gaslight & Coke Co. v. Fargo Gas & E. Co.* 37 L.R.A. 593; *National Bank v. Taylor*, 5 S. D. 99, 58 N. W. 297.

Where there is no open way by which the buyer of goods can discover their worthlessness, it is a fraud on the part of the seller to remain quiet. Concealment implies design or purpose. *Liland v. Tweto*, 19 N. D. 551, 125 N. W. 1032; 20 Cyc. 63; *Jordan v. Pickett*, 78 Ala. 331; *Hoeck v. Bowman*, 42 Neb. 80, 47 Am. St. Rep. 691, 60 N. W. 389.

The corporation in which defendant held stock which he exchanged with the plaintiffs for their land was insolvent at the time of the transaction, and this was known to defendant at such time. *State v. Bomer*, 103 Iowa, 106, 72 N. W. 424; 22 Am. & Eng. Enc. Law, 1238; *Redding v. Godwin*, 44 Minn. 355, 46 N. W. 565.

Where there is any defect, imperfection, or omission in a pleading, in form or substance, which would have rendered it demurrable, yet if issue is joined, and is such as requires proof of the facts so imperfectly pleaded or omitted, and without which proof it is not presumed that the court would direct, or the jury give, a verdict, any such defect is cured by the verdict. *Ashe v. Beasley*, 6 N. D. 191, 69 N. W. 188; *Buchanan v. Minneapolis Threshing Mach. Co.* 17 N. D. 343, 116 N. W. 335; 31 Cyc. 764; *Delaney v. Western Stock Co.* 19 N. D. 630, 125 N. W. 499.

There is a vast difference between the sale of a stock of merchandise and a sale of a house, a horse, or other piece of property open to personal inspection and view, and the rules applicable are different. *Fargo Gas & Coke Co. v. Fargo Gas & E. Co.* 4 N. D. 221, 37 L.R.A. 593, 59 N. W. 1066; *Liland v. Tweto*, 19 N. D. 551, 125 N. W. 1032.

Goss, J. In February, 1911, plaintiffs purchased of defendant his one half of the corporate stock of a corporation known as the Lowry Mercantile Company, in Minnesota. For it they gave two farms in North Dakota. Plaintiffs claim, and the trial court found, that in the trade defendant made false representations as to the value of the merchandise stock, and that dividends had been declared and paid on it, and that the corporate stock was worth par, and that the business was in a prosperous and profitable condition, while in fact the business was in an insolvent condition and the stock was worthless. Plaintiffs took possession in April, 1911, of the merchandise business with its stock of goods. One of the plaintiffs had spent a week or more in the store of the mercantile company before dealing, and had gone over its books and merchandise stock in a general way to ascertain the worth and financial condition of the institution before buying in. After such examination the deal was made, and the possession of the corporate stock delivered, and the merchandise business taken over by plaintiffs. From April, 1911, to November, 1911, the plaintiffs managed and controlled the

33 N. D.—17.

business. It did not prosper, and a meeting of the stockholders, including plaintiffs, was had November 18, 1911, at which a "resolution was unanimously passed to put the company in the hands of a trustee for the benefit of creditors." Before an assignment was made, however, the mercantile building with its stock of merchandise was burned. One of the stockholders, Iver Selleseth, defendant's brother, was then arrested, accused of having caused the fire, but was discharged on preliminary examination. While plaintiffs were conducting the business they continued to buy goods of the same wholesale houses to the extent of several thousand dollars worth, and sales had been made from the stock in the usual conduct of the business. Also, a portion of the merchandise stock had been taken to Battleview, North Dakota, where a branch store was established and sold. Seven hundred and twenty-four dollars corporate indebtedness had been incurred to wholesale houses for new goods taken to Battleview. Plaintiffs complain of having discovered during this time that notes given for merchandise stock to the wholesalers were outstanding and unpaid to the extent of several thousand dollars, having been deceived at the time of purchase by false entries in the books showing payment of goods actually unpaid for. In the fire some of the books were destroyed, among them the inventories of the stock. It is clear from the testimony of the plaintiffs that they did not know the condition of affairs at the time they bought the business, probably relying upon the statements of the seller. They were evidently inexperienced, and not business men. The proof is uncertain as to the financial condition, solvency, or insolvency of the concern when purchased. Considerable is left to speculation as to whether the failure was because of business mismanagement by plaintiffs during 1911, or whether the corporation was insolvent at the time of the sale in February.

However, after the fire, the plaintiffs distributed the proceeds of the insurance among the creditors, collected accounts, and wound up the business. Only the lots on which the building stood remain unsold. During all of this time they seem to have made no complaint that they were dissatisfied, and defendant remained in possession of the farms given in exchange for the stock. On July 26, 1912, a year and a half after the sale, a letter was written defendant by the attorneys for plaintiffs, notifying him for the first time that the plaintiffs rescinded the purchase of

the corporate stock and the sale of their lands therefor, because of false representations made and inducing the exchange, and demanded that he reconvey the land. With the letter were inclosed the shares of corporate stock received for the lands, which stock was by defendant promptly returned. The complaint recites the false representations as the inducing cause of the deal, their known falsity; that the stock received for the land was worthless; "that these plaintiffs immediately upon discovering the false, deceitful, and fraudulent representations hereinbefore mentioned, and prior to the commencement of this action, and as soon as they became aware of their right so to do, did restore and deliver to the defendant all of the stock certificates heretofore mentioned, and did restore and offer to restore to the defendant all of the property they had procured from the defendant, and did rescind said contract and demand that the defendant deliver to the plaintiffs said \$800 note (given by them to defendant as the excess of the purchase price over the land transferred for the stock) and make, execute, and deliver deeds to said lands to the plaintiffs." The trial court found for the plaintiffs, and adjudged a reconveyance and a cancelation of the note or an alternative judgment against defendant for its amount. A trial *de novo* is demanded on this appeal.

The evidence would seem to establish conclusively that ordinary business prudence would have caused plaintiffs, within a reasonable time after their purchase, to have taken stock of what they had bought, and ascertained their liabilities. They allege that the stock of goods was worth much less than represented, and have offered the testimony that a year and a half before this sale the values of the goods as carried upon the inventories taken greatly exceeded the market price of second-hand goods. In this way they would reduce the price of the stock on hand sufficient to establish the insolvency of the corporation. Then they argue that an insolvency once shown to exist is presumed to continue, or at least to cast the burden upon defendant to establish the contrary to escape imputation of insolvency at the time of the sale. But the proof made as to this is far from conclusive. Doubtless the apparent value of any second-hand merchandise stock could be similarly depreciated. Plaintiffs should have inventoried the stock and have been in position to make proof of their cause of action, instead of depending upon infer-

ences to establish fraud. They were likewise negligent in failing to discover their financial condition until the fire had caused the creditors to present claims, though they kept the corporate books. Even the proof of the amount of claims at that time outstanding is indefinite and almost wholly hearsay, on a matter easy to establish by clear and competent proof. They do not show their disbursements for stock or expenses or time or cash sales while running this business. In short, the proof is indefinite as to what they bought of defendant, what they sold or took out of the stock, what debts they assumed, and what debts they contracted, as well as what they owned when burned out, and what they afterwards paid and what they still owe. They have no definite knowledge on these matters,—only estimates and approximates are given. Their failure of proof in these respects results from their own carelessness. And if they conducted this business from April to November in the same way, it is not to be wondered at that it went upon the rocks. They make no showing of how many thousands of dollars of claims outstanding at the time of the fire resulted from purchases made by them during the summer. They have not established the amount of goods taken from the stock with which to start their branch store at Battleview. That is also left to conjecture, except that it appears that \$724 of their liabilities was for the purchase of new stock for that place, bought on the corporation's credit.

And it is significant that plaintiffs found no fault with their deal until eight months after the fire, and until after they had disbursed the entire proceeds of the insurance and collections made. And they must have been fully aware of any fraud perpetrated on them in the sale of this stock by November, 1911, at the latest. They then realized that the business was insolvent, and, holding 50 per cent of the corporate stock, voted to place the concern under a trustee for benefit of its creditors. Had they then promptly rescinded, a court of equity might perhaps have overlooked their palpable negligence in conducting the business for eight months prior without ascertaining its financial condition. But with bankruptcy thus confronting them in November, they were required to make an immediate rescission or waive the right to rescind. Thereafter it was not a matter of conducting the business, but instead using the stock to pay creditors in winding up affairs in settlement of corporate

and their individual liabilities. However, no effort to rescind was made. Buildings and stock were burned, and with the fire the invoices were destroyed. And the inference is that, through their negligence, they were underinsured when burned out.

Albert Rosenwater, manager of the business, testifies:

Q. Upon the building and stock you didn't carry enough insurance. Isn't that a fact?

A. I thought so at that time.

Q. And the fire cost you and Iver Selleseth a good deal of money didn't it?

A. Yes, sir.

Q. Do you know how much money was received from the insurance companies, that is, how much the insurance policies were for?

A. I know what they were in force for.

Q. What was the amount?

A. Fifteen thousand seven hundred dollars.

Q. What was done with this much money?

A. I suppose it went to pay the creditors.

From hearsay sources it may be inferred that the amount of insurance received paid two thirds the total liabilities, but who they were paid by does not appear. The amount of the loss occasioned by the fire is not shown, although admittedly considerable. So much for the facts.

This action is one in equity for a rescission of the sale and cancellation of the deeds and note, to the end that by decree in equity plaintiffs may recover all the real estate and property given in exchange for the corporate stock. The right to recover upon any fraud practised by the defendant upon plaintiffs is based upon the rescission upon discovery that they had been victimized. Among the grounds urged for a reversal, appellant contends: (1) "Plaintiffs, not having rescinded promptly on discovery of the alleged fraudulent acts, have waived their right to rescind;" and (2) "plaintiffs have never restored to the defendant the consideration for the contract which they asked to have rescinded, and that therefore the court is without authority to grant plaintiffs equitable

relief." Both of these assignments are well taken. Assuming fraud in the sale, plaintiffs could elect (1) "to execute the contract and take its benefits so far as obtainable, and recover any damages sustained by the false statements; or (2) to rescind the contract, and recover any moneys paid or property delivered under it." *Sonnesyn v. Akin*, 14 N. D. 248, 104 N. W. 1026. This action is brought under the second alternative. Quoting further from that opinion: "It is the rule that the defrauded party to a contract has but one election to rescind, and that he must exercise that election with reasonable promptitude after the discovery of the fraud," citing *Dennis v. Jones*, 44 N. J. Eq. 513, 6 Am. St. Rep. 899, 14 Atl. 913, and *Bigelow, Fraud*, 436. And "a sale of personal property followed by actual delivery cannot be rescinded unless the property be promptly returned to the seller, or its return tendered and refused, or its return waived." *Syllabus to L. J. Owens Co. v. Doughty*, 16 N. D. 10, 110 N. W. 78. The requirement is statutory (sec. 5936, Comp. Laws 1913) that "rescission when not affected by consent, can be accomplished only by the use on the part of the party rescinding it of reasonable diligence to comply with the following rules: 1. He must rescind promptly upon discovering the facts which entitle him to rescind if he is free from duress, menace, undue influence or disability and is aware of his right to rescind and 2. he must restore to the other party everything of value which he has received from him under the contract, or must offer to restore the same upon condition that such party shall do likewise, unless the latter is unable or positively refuses to do so." Incidentally it may be remarked that this is the identical language of § 1691 of the Civil Code of California governing rescission not affected by consent. "The contract did not provide for the mode by which it could be rescinded. The provisions of the statute must therefore control, and it provides that as a condition of rescission that everything of value received under the contract must be restored or offered to be restored, and that the rescission must be promptly made," from the opinion in *L. J. Owens Co. v. Doughty*, 16 N. D. 10, at p. 13. "A fraudulent sale passes to the defrauded purchaser a title voidable at the option of the purchaser if rescinded with reasonable promptness after the discovery of the fraud." *Syllabus to Ditton v. Purcell*, 21 N. D. 648, 36 L.R.A.(N.S.) 149, 132 N. W. 347. Though in equity

the beginning of the suit, if promptly brought, may be regarded as sufficient notice of rescission where the *status quo* of the parties has not changed under the sale. *Sneve v. Schwartz*, 25 N. D. 287, 141 N. W. 348. Again, "Rescission of a contract is the act of canceling it by restoring the conditions existing immediately before it was made. Rescission is effected by each party returning to the other what has been received pursuant to the contract, or its equivalent. . . . The defrauded party has the option to treat the transaction as void or valid, and this right continues so long as the party having the election does not do anything which amounts to a ratification. The defrauded party is not required to give notice of disaffirmance, provided he does not, after knowledge of the fraud, retain the fruits of the fraudulent transaction, or tacitly or by affirmative action lead the other party to change his position by reason of apparent ratification." *Raymond v. Edelbrock*, 15 N. D. 231, at pp. 234, 235, 107 N. W. 194. "If a person desires to rescind a contract on the ground of fraud, and recover back what he has paid, he must act promptly on the discovery of the fraud. If he desires to rescind on the ground of fraud or mistake he must, on the discovery of the facts, at once announce his purpose and adhere to it. If he is silent and continues to treat the property as his own, he will be held to have waived the objection, and will be conclusively bound by the contract. He is not permitted to play fast and loose. In such case he is not permitted to experiment and see whether the transaction may turn out well. Acquiescence for a little time in such cases is a condonation." *From Smith, Fraud*, § 132. "The general rule is that a party desiring to rescind a contract procured by fraud must put the other party *in statu quo* as far as he is able to do it. Where the right to rescind springs from subsequently discovered fraud, the defrauded party does not lose his right to rescind because the contract has been partly executed and the parties cannot be fully restored to their former positions. But he must rescind *as soon as circumstances permit*, and must not go on with the contract after the discovery of the fraud, so as to increase the injury necessarily caused to the fraudulent party by the rescission." Section 133, same work. "Where a person has been defrauded in the purchase of goods, and desires to rescind the contract of purchase, the general rule upon the subject is that where the person

defrauded has done all that is reasonably possible to restore the parties to the condition in which they were before the contract was made, it is a rescission. He must return or offer to return all he has received if it is of any value. It is a familiar rule, and settled by a long line of authorities, that where a party discovers that fraud has been practised upon him in the making of a contract, it is his duty at once to repudiate the contract and tender back what has been received by him under its terms, so that all the parties may be placed as near as possible in the position occupied before the contract was consummated." Same work, § 135. "Equity does not strive to save the perpetrator of the fraud from any harm. It does, however, stand for the principle that no party may successfully invoke the aid of equity for the rescission of a contract, unless he is willing to restore the other party to the possession he enjoyed at the time the contract was made." Same text, § 138. "A person cannot be deprived of his remedy in equity on the ground of laches unless it appears that he had, or ought to have had, knowledge of his rights. But upon discovery of the grounds entitling him to rescission, he must act with reasonable promptness to avoid the imputation of acquiescence. . . . If the delay is unreasonable, and the adversary party has changed his position so that he cannot be placed *in statu quo*, rescission will be denied." Elliott, Contr. 1913 ed. § 2431. "Delay for an unreasonable time after the discovery of the ground for rescission may, without positive acts of ratification, amount to a waiver of the right to rescind." Section 2433, same work. "To obtain rescission of a contract for fraud, whether such relief is sought informally or by formal decree in equity, the adversary party must usually be placed *in statu quo* by the party seeking relief. And if, upon the discovery of the fraud, the defrauded party fails to offer to return whatever of value he has received under the contract, he affirms the contract." Section 2434, same treatise. "While it is not necessary that a buyer rescind a sale immediately upon his discovery of grounds therefor, the buyer must exercise his right to rescind within a reasonable time if the discovery of the facts justify a rescission. What is a reasonable time must in each case depend on the circumstances attending it. . . . The time within which the right is exercised must be computed from the discovery of the fraud or defect on which rescission is based, and not

from the date of the sale, but the buyer must use reasonable diligence to ascertain the facts, especially if there is anything to put him on inquiry." 35 Cyc. 151-B. "The general rule that to justify a rescission the parties must be placed *in statu quo* applies when rescission is sought by the buyer. The rule that the parties must be placed *in statu quo* does not require an absolute and literal restoration of the parties to their former condition, but it is sufficient if such restoration is made as is reasonably possible and such as the merits of the case demand. The buyer must, as a condition precedent to rescission, restore or offer to restore the property, and as a general rule cannot rescind if he has sold the goods or any part thereof, although it has been held in some instances that he may tender the money received therefor and rescind. . . . As a general rule, the buyer must return or tender all of the property received." 35 Cyc. 146, 147. Page, Contr. §§ 137-140. "One seeking to rescind must restore or offer to restore all benefits received under the contract, and if it has become impossible for him to do so, he cannot rescind, but must resort to an action for damages." 11 Abbott's N. Y. Cyc. Dig. p. 734. But plaintiffs realized the necessity of returning the property bought and of placing defendant in substantially the same position as he was at the time of the sale. This is shown by them pleading a return of the corporate stock upon attempted rescission and proof thereof made. But the return was only colorable. The stock was valueless, the property it had represented having been wasted, dissipated, and destroyed by plaintiffs. It was an impossibility to substantially or approximately reinstate the *status quo*. There exists not only a failure of proof of a right of rescission, but proof beyond question that rescission under such circumstances cannot be had. For authority denying right to rescind even in the absence of destruction or sale of the stock of goods, see *Bailey v. Fox*, 78 Cal. 389, 20 Pac. 868. This was an action of the same kind upon the same grounds to rescind the sale of a stock of hardware and agricultural implements sold upon inflated inventory, with rescission based upon false representations made on the sale, consummated November 30, 1895. Plaintiff did not discover the fraud until the following June. But with fraud established rescission was refused. It was said: "At the time the offer to rescind was made, it had become impossible by the act of the plaintiff himself, or jointly

with the other active partner, to place the defendant *in statu quo*. As a result of the sale a partnership had been formed, as we have stated, and the whole of the stock had become partnership property in which Meinecke, who was not made a party to this action, had an interest. A large part of the stock had been sold and new stock purchased on credit, for which the defendant, as well as the other partners, was personally liable. This being the situation of affairs, it was utterly impossible to place any of the parties *in statu quo*. It is well settled that under such circumstances there can be no rescission of the contract. Civil Code, § 1691." To the same effect is *Marten v. Paul O. Burns Wine Co.* 99 Cal. 355, 33 Pac. 1107. "He who would rescind a sale for fraud must act diligently upon discovering the fraud, and must show himself not only willing, but *able, to return the property received by him.*" Syllabus in *Toby v. Oregon P. R. Co.* 98 Cal. 490, 33 Pac. 550. "It will be seen that when a breach of the contract has occurred the party is often put to his election whether he will rescind or sue for damages, and sometimes he cannot rescind, but must sue for damages *because he cannot place the other party in statu quo.*" *Merrill v. Merrill*, 103 Cal. 287-291, 35 Pac. 768, 37 Pac. 392. "It is clear upon principle that this present action should not be maintained, because to maintain it would be to violate the wholesome and fundamental doctrine that in such a case the party claiming to be aggrieved must promptly rescind or offer to rescind so as to put the other party *in statu quo*. He cannot wait to speculate on future contingencies. The sale from appellant to respondent was not void; *it was only voidable upon restoration of the consideration paid.*" *Bancroft v. Bancroft*, 110 Cal. 374-379, 42 Pac. 896. "If equity can be done between the parties by placing them *substantially* in the same position as far as practicable equity will grant relief." *Green v. Duvergey*, 146 Cal. 379, 80 Pac. 234. These California cases construe a statute identical with ours governing rescission. Besides plaintiffs have had the full benefits of the transaction, used thousands of dollars of the proceeds of the merchandise stock in paying debts, part of which at least they were personally liable for, and to that extent have taken benefits of the contract of sale with knowledge of the fraud alleged. They thereby conclusively affirmed the contract and lost any right of rescission they might otherwise have availed of. *Bennett v. Glaspell*,

15 N. D. 239, 107 N. W. 45, and Annis v. Burnham, 15 N. D. 577, 108 N. W. 549.

Indeed, if rescission can be had in this case, under these facts, it is hard to conceive when it would not be allowable. To permit it would disregard the statutory requirements exacting promptness, return of consideration received, and the placing of the parties *in statu quo* as a condition precedent to rescission. It would likewise be in disregard of all that has been said upon those questions in the many previous decisions of this court. The judgment appealed from is ordered reversed and the action dismissed.

M. O. GRANGAARD v. JOHN BETZINA.

(156 N. W. 1035.)

Real estate broker — land listed with, for sale — specific price — compensation — dependent thereon — contract — performance — purchaser.

A broker employed to sell land for a specific price, and who has agreed with his principal that he shall receive a dollar an acre commission provided that he sells at such price, does not perform his engagement so as to be entitled to recover such commission in a suit upon such contract, by producing a purchaser who is not willing to pay the price named, and even though the owner thereafter sells the land to such purchaser at a lower price, and where there is no proof that the owner did not act in good faith or that he prevented the broker from performing his contract.

Opinion filed February 14, 1916.

Note.—That a broker can recover his commission under a special contract with his principal only upon complying with the terms of such contract is in accord with the general doctrine as can be seen by an examination of subdiv. VI., p. 611, in an exhaustive note in 44 L.R.A. 593, on performance by a real estate broker of his contract to find a purchaser or effect an exchange of his principal's property.

The effect upon the right to commissions of the fact that the owner sold the property to a broker's customer at a reduced price is discussed in notes in 15 L.R.A. (N.S.) 272; 34 L.R.A. (N.S.) 1050.

Generally, on when a broker becomes entitled to or has earned his commissions, see notes in 28 Am. St. Rep. 546 and 139 Am. St. Rep. 225.

Appeal from the district court of Barnes County, *Coffey, J.* Action to recover commission on a sale of real estate. Judgment for plaintiff. Defendant appeals.

Reversed.

Lee Combs and *L. S. B. Ritchie*, for appellant.

A broker is not entitled to compensation until he has performed the contract according to its specific terms, where there is no waiver, or ratification of other acts. A real estate broker who is to secure a buyer on specific terms, price and compensation, is not entitled to any compensation until such buyer is produced. 19 Cyc. 240; *Anderson v. Johnson*, 16 N. D. 174, 112 N. W. 139; *Larson v. Newman*, 19 N. D. 153, 23 L.R.A.(N.S.) 849, 121 N. W. 202; *Park v. Hogle*, 124 Iowa, 98, 99 N. W. 185; *Stoutenburgh v. Evans*, 142 Iowa, 239, 120 N. W. 59, 19 Ann. Cas. 1048; *Marble v. Bang*, 54 Minn. 277, 55 N. W. 1131; *Bolton v. Coburn*, 78 Neb. 731, 111 N. W. 780; *McArthur v. Slauson*, 53 Wis. 41, 9 N. W. 784.

Producing a purchaser who will not pay the price named, but who thereafter deals direct with the landowner and buys at a lower price, does not entitle the broker to compensation. *Terry v. Bartlett*, 153 Wis. 208, 140 N. W. 1133, and cases cited; *Carey v. Johnson*, 122 C. C. A. 78, 203 Fed. 682; *Montgomery v. Slater*, 87 Kan. 848, 126 Pac. 1085; *Good v. Erker*, 170 Mo. App. 681, 153 S. W. 556; *Stevenson v. Bannan*, 235 Pa. 512, 84 Atl. 447; *Gage v. Billing*, 12 Cal. App. 668, 108 Pac. 664.

A variance between the complaint in an action by a broker for commissions, which alleges that the owner agreed to sell his land and to pay the broker a specified sum for procuring a purchaser willing to pay a specified sum per acre, and the proof which shows that the owner exchanged his land for other land, is fatal. *Steere & Ballah v. Gingery*, 21 S. D. 183, 110 N. W. 744; *Chaffee v. Widman*, 48 Colo. 34, 139 Am. St. Rep. 220, 108 Pac. 995; *Comp. Laws* 1913, § 7440, subdiv. 2; *Forsell v. Pittsburgh & M. Copper Co.* 38 Mont. 403, 100 Pac. 219; *Hayes v. Fine*, 91 Cal. 391, 27 Pac. 772; *Spellman v. Rhode*, 33 Mont. 21, 81 Pac. 395.

Winterer & Ritchie, for respondent.

The rule is that where a broker departs from the terms of his original authority, the owner's adoption of his negotiations and the completion of the transaction operate as a ratification of the broker's acts, and entitle the broker to his compensation. *Siler v. Perkins*, 126 Tenn. 380, 47 L.R.A.(N.S.)232, 149 S. W. 1060.

Where the broker is given exclusive authority to sell the property within a given stated time, a sale by the owner within such time will not destroy the broker's right to compensation. *Geiger v. Kiser*, 47 Colo. 297, 107 Pac. 267.

Where the terms and conditions of the actual sale are somewhat different from those mentioned in the contract, yet if adopted by the owner and he acts upon them, he ratifies the same, and cannot be heard to dispute the right of the broker to his compensation. *Lawson v. Black Diamond Coal Min. Co.* 53 Wash. 614, 102 Pac. 759; *Wright v. McClintock*, 136 Ill. App. 438; *Hessling v. Frey*, 182 Ill. App. 547; *Friedenwald v. Welch*, 174 Mich. 399, 140 N. W. 564; *McCormick v. Obanion*, 168 Mo. App. 606, 153 S. W. 267; *Parks v. Sullivan*, — Tex. Civ. App. —, 152 S. W. 704; *Merritt v. American Catering Co.* 71 Wash. 425, 128 Pac. 1074; *Evans v. Shinn*, 40 App. D. C. 557; *Rasar v. Spurling*, 176 Ill. App. 349; *Slotboom v. Simpson Lumber Co.* 67 Or. 516, 135 Pac. 889, 136 Pac. 641, Ann. Cas. 1915C, 339; *Webb v. Harding*, — Tex. Civ. App. —, 159 S. W. 1029; *Shober v. Blackford*, 46 Mont. 194, 127 Pac. 329; *Smith v. Sears*, 160 Ill. App. 240; *Peters v. Holmes*, 45 Pa. Super. Ct. 278; *Prindle v. Allen*, 164 Mich. 553, 129 N. W. 695; *Lord v. United States Transp. Co.* 143 App. Div. 437, 128 N. Y. Supp. 451; *Peterson v. St. Francis Hotel Co.* 61 Wash. 378, 112 Pac. 347; 19 Cyc. 249, and cases there cited; *Walker, Real Estate Agency*, arts. 450, 502, 532.

If a broker brings the parties together and as a result they conclude a sale or contract, he is not deprived of his right to commission by the fact that the contract so concluded differs in terms from the one which he was authorized to make. 19 Cyc. 249; *Hubachek v. Hazzard*, 83 Minn. 437, 86 N. W. 426; *Armstrong v. Wann*, 29 Minn. 126, 12 N. W. 345.

The test of a complaint is whether or not it is sufficient to fully apprise the defendant of the plaintiff's claim; there is no variance be-

tween the pleading and the proof; even where there is a variance, it must be material, and it must appear that defendant was misled to his prejudice in preparing and maintaining his defense. Comp. Laws 1913, §§ 7478, 7480; *Maloney v. Geiser Mfg. Co.* 17 N. D. 195, 115 N. W. 669; *Halloran v. Holmes*, 13 N. D. 411, 101 N. W. 310.

BRUCE, J. We are of the opinion that the trial court erred in not directing a verdict for the defendant. There was a complete variance between the proof and the complaint. In his complaint the plaintiff pleads a contract of employment for finding a purchaser for the appellant's land, and that he was to have a dollar an acre for finding such purchaser, without regard to the price to be paid by such purchaser for the property. In his evidence he declares that he was to find a purchaser and to cause the sale of the land to him at \$50 per acre, out of which purchase price the respondent was to receive \$1 per acre. The plaintiff himself testified: "He wanted \$50 per acre for the land. Out of this he agreed to pay \$1 per acre for commission." In such a case the most liberal rule that the plaintiff can ask is that the evidence shall establish the issues. On these issues the proof is positive and uncontradicted that the plaintiff did not furnish a purchaser who at any time was ready and willing to pay \$50 an acre for the land. The purchaser (*Vandrovac*) testified: "He (*Grangaard*) said I could have the land for \$50 per acre. Mr. *Grangaard* said I could not have it for less than \$50 per acre. I said I would not pay that." The testimony is also positive that the land was sold by the defendant to *Vandrovac* for about \$48 per acre after *Vandrovac* had positively refused to pay any more.

It is not necessary for us to consider the decisions in other states upon the question which is presented to us, as, it is quite clear that under the law as settled in this jurisdiction and under the evidence introduced in this case the plaintiff cannot recover upon the contract which is sued upon. It is well settled, indeed, in North Dakota, that when a man agrees to pay a commission in consideration of the receipt of a certain price, he means what he says, and nothing more, and the fact that one has agreed to pay \$1 per acre if the broker sells his land for \$50 an acre does not make him liable for such commission, and

under such contract if he afterwards sells the land for \$48 an acre, and even to a person presented by the broker, provided that the person has positively refused to purchase at \$50 and the seller has in no way prevented the broker from perfecting the sale of such land at the said sum.

The first of the cases which hold to this rule is that of *Anderson v. Johnson*, 16 N. D. 174, 112 N. W. 139. In that case the situation of the parties was reversed, but the same principle applied. In it the defendant agreed to pay the plaintiffs a commission of \$100 if they obtained the sale to him of certain real estate at a stated price, and this court held that it was incumbent upon the plaintiffs in an action to recover such commission to prove that the person produced as the owner of such property was willing to sell at such stated price. "Plaintiffs," this court said, "must stand on their contract, and in order to recover they must show that Staiger sold the property to defendant, or at least was willing to do so, for \$2,300. What Staiger may have previously stated to plaintiffs as to his willingness to sell upon such terms is wholly immaterial as well as incompetent. . . . Was defendant precluded from thereafter making the best bargain he could and by doing so would he become obligated to the plaintiffs to pay them the agreed commission, which, under the contract, was to be paid only on condition that they were able to get him the property at \$2,300? Clearly not." This case was cited with approval and followed in *Fulton v. Cretian*, 17 N. D. 335, 117 N. W. 344. It is in accordance with quite a long line of authorities and with the general rule which is expressed in *Terry v. Bartlett*, 153 Wis. 208, 140 N. W. 1133, and to the effect that a broker employed to sell land for a specific price does not perform his engagement so as to be entitled to commissions by producing a purchaser who is not willing to pay the price named, and even though the owner thereafter sells it to him at a lower price, except where the owner does not act in good faith or prevents the broker from performing his contract. *Good v. Erker*, 170 Mo. App. 681, 153 S. W. 556; *Gage v. Billing*, 12 Cal. App. 688, 108 Pac. 664; *Montgomery v. Slater*, 87 Kan. 848, 126 Pac. 1085; *Steere & Ballah v. Gingery*, 21 S. D. 183, 110 N. W. 774; *Paulson v. Reeds*, ante, 141, 156 N. W. 1031.

In the case at bar there is no proof of bad faith on the part of the defendant. The evidence, on the other hand, is positive and uncontra-

dicted that the purchaser absolutely refused to buy at the price of \$50 per acre, and it is perfectly clear that the defendant could have gained nothing by upsetting any supposed agreement for \$50 an acre. All he received was \$48 an acre. If the purchaser could have been induced to pay \$50, and even though the defendant would have had to pay the \$1 an acre commission, he would have made a dollar an acre or \$240 more than by the transaction he actually consummated.

The judgment is reversed and the cause remanded, with directions to enter judgment for the defendant, dismissing the action, and for the costs thereof.

STATE BANK OF MAXBASS v. HURLEY FARMERS ELEVATOR COMPANY, a Corporation, and J. A. WHITMORE, Intervener, Consolidated with STATE BANK OF MAXBASS, a Corporation, v. JOHN D. GRUBER COMPANY and J. A. Whitmore, Intervener.

(156 N. W. 921.)

Mortgagee — conversion — action for — cropping contract — tenant — owner of land — title to grain raised — to remain in owner — physical division of grain — equal parts — placed in different bins — knowledge of landlord — no objections — asserting claim — delay in — mutual account — unsettled — facts — jury — submission of case to — on questions of delivery and division — vesting title.

1. Actions in conversion by mortgagee, plaintiff, for grain delivered elevator companies, defendants. W., owner of the land on which the grain was raised under a contract with his tenant B., intervenes, asserting that title to the grain had never passed to the tenant, and that plaintiff's mortgage had never attached, and that intervener was entitled to said grain to satisfy his alleged claims against his tenant. The cropping contract was in the usual form, stipulating title as remaining in the landlord until after a division and delivery of the crop or its proceeds, and empowering the landlord to retain the crop or any portion thereof for any indebtedness due him from the tenant.

Note.—Croppers, who they are, their title and their remedies is the subject of a note in 98 Am. St. Rep. 952.

Croppers as tenants are discussed in note in 4 L.R.A.(N.S.) 698.

A physical division of the grain into equal parts at the threshing machine was proven; also, that the portions were placed in different bins; that the tenant was permitted to hold his portion and store the same in his own name, understanding the same to be his share; that the landlord knew all this, made no objection, and took no steps for six weeks after threshing, and until long after marketing, to assert any claim to the tenant's portion; that meanwhile the tenant had hauled to market the landlord's portion, at his request, and as the landlord's share and in compliance with the contract; that the tenant had paid his portion of the thresh bill and performed all conditions of the contract, except one in which he was prevented during the summer by the landlord from completing; that the crop in question was raised the first year of a three years' cropping agreement; that no formal settlement of accounts had been had or was had, although the tenant was released from further performance of the contract by the landlord the following spring; that there was a mutual account between the parties unsettled. The court permitted the landlord to show the full amount of his account against the tenant, but excluded proof offered by the plaintiff from the tenant that the landlord owed more than the latter owed the landlord, and that in fact the landlord had no charge or lien upon the grain at the time it was delivered at the threshing machine to the tenant and by him subsequently marketed.

Held: The facts were sufficient to authorize submission to the jury of whether a division and delivery with intent to vest title in the tenant had been made; and

Mutual accounts — landlord and tenant — between.

2. The fact that a settlement of mutual accounts between the landlord and tenant had not been made is not necessarily controlling.

Grain — conversion — landlord — extent of recovery — issues as framed — landlord's claim — amount thereof — validity.

3. In an action in conversion of grain and under issues as here framed by the pleadings, the landlord can recover only to the amount that will suffice to completely indemnify him from actual injury. It was therefore necessary to determine the validity and amount of his alleged claim and lien.

Testimony — exclusion of — lien — waiver of — division — intent of parties — landlord — subsequent acts — amount of indebtedness.

4. Under the pleadings and the proof the excluded testimony was admissible (a) on whether the landlord had not waived any lien he may have claimed upon the tenant's share for advances; and (b) as bearing upon the intent with which the division was made and acts subsequent thereto were permitted by the landlord, and (c) as proper proof under the pleadings and the issues involved as to the amount the tenant was owing the intervener if he owed him anything at all.

Plaintiff — jury — questions for — verdict — direction — error.

5. Plaintiff was entitled to have the foregoing questions submitted to the jury, and the direction of a verdict against plaintiff after the proof made was error.

Judgments — appeals — orders — costs — taxation.

6. As this appeal determines two actions, the judgments appealed from are ordered set aside and new trials are granted, with plaintiff's costs to be taxed against the intervener. The elevator companies being mere stakeholders, no costs will be taxed against them.

Opinion filed February 16, 1916.

Appeals from the District Court of Bottineau County, *Burr, J.*
Reversed.

John E. Martin, and *Bowen & Adams*, for appellant.

The court erred in granting the motion for and directing a verdict in favor of defendant. The questions of whether or not there had been an intended actual division of the grain between the landlord and tenant, and the waiving of any lien or claim to ownership by defendant, should have been submitted to the jury, under proper instructions from the court. The evidence was conflicting upon material facts. *Lallier v. Pacific Elevator Co.* 25 S. D. 572, 127 N. W. 558; *Aronson v. Oppegard*, 16 N. D. 595, 114 N. W. 377.

In this case there was an actual division of the grain between landlord and tenant, so that its identity was fixed, and the tenant was permitted to treat that portion of the grain mentioned in the contract, and so set apart as his property, to market and store the same in his own name, all with the knowledge of the landlord, and without objection. Under these circumstances the tenant's chattel mortgage upon his half of the grain attached thereto and became a valid lien thereon. *Aronson v. Oppegard*, *supra*; *Angell v. Egger*, 6 N. D. 391, 71 N. W. 547; *Hawk v. Konouzki*, 10 N. D. 37, 84 N. W. 563; *Simmons v. McConville*, 19 N. D. 787, 125 N. W. 304; *Lallier v. Pacific Elevator Co.* *supra*; *Bidgood v. Monarch Elevator Co.* 9 N. D. 627, 81 Am. St. Rep. 604, 84 N. W. 561.

It was Whitmore's duty to establish and prove the amount of his lien, if he had one. *Aronson v. Oppegard*, *supra*.

Weeks & Moum, for intervener and respondent, and *Grace & Bryans* and *A. Woodward*, for respondents.

The mortgagor had no interest in the crop at the time the mortgage was given. His interest was contingent upon his full performance of the contract with his landlord. Until such performance, the title to all the grain remained in the landlord or owner of the land, and the tenant's chattel mortgage thereon did not attach or become a lien. *Hawk v. Konouzki*, 10 N. D. 37, 84 N. W. 563; *Bidgood v. Monarch Elevator Co.* 9 N. D. 627, 81 Am. St. Rep. 604, 84 N. W. 561; *Savings Bank v. Canfield*, 12 S. D. 330, 81 N. W. 630; *Angell v. Egger*, 6 N. D. 391, 71 N. W. 547; *Whithed v. St. Anthony & D. Elevator Co.* 9 N. D. 224, 50 L.R.A. 254, 81 Am. St. Rep. 562, 83 N. W. 238; *Simmons v. McConville*, 19 N. D. 787, 125 N. W. 304.

In an action by a mortgagee the burden of proof is upon him to show that the mortgagor had or acquired legal title, at some time prior to the action. An equitable interest is not sufficient. *Hawk v. Konouzki*, 10 N. D. 37, 84 N. W. 563.

Goss, J. This opinion decides two appeals. The plaintiff in separate actions sued the Hurley Farmers Elevator Company and the Gruber Company for conversion of grain stored by one Warren Benson. Plaintiff's rights in both cases are claimed upon the crop admittedly grown upon the same land. Both elevator companies answer that they are merely holding certain grain stored with them by Benson, and are willing to deliver the grain or the proceeds thereof to whomsoever the court shall decide shall be entitled thereto, and that the grain has been claimed by both plaintiff and one J. A. Whitmore, upon whose land it was raised. Thereupon, by stipulation of all parties, Whitmore was allowed to file his complaint in intervention, claiming the grain as against the elevator companies and plaintiff. The cases were consolidated. The same record governs both appeals. At the conclusion of the plaintiff's case the trial court directed a verdict for the intervener, dismissing both actions, and adjudging Whitmore the owner and entitled to all said grain. Plaintiff appeals.

The facts are not much in dispute. The intervener owned the land farmed by Benson, his tenant, in 1912 under the usual cropper's contract stipulating that title should be and remain in the landlord until after division and delivery of one half of the grain to the tenant, or the

proceeds thereof, and that such reservation of title should also be security for the full and faithful performance of all conditions of the contract and any advancements to the tenant, and that the landlord might deduct for any advancements or indebtedness of the tenant from the tenant's share of the grain, or the proceeds thereof. The lease did not expire with the crop season of 1912, but covered the next two succeeding years. No express or stipulated settlement was made of the mutual accounts of the parties, but the contract was abandoned by mutual consent in the spring of 1913, without one following the threshing and division of the grain and the marketing of it in fall of 1912. The issue presented is whether there is sufficient proof to take the case to the jury for their finding upon whether the crop was divided between the parties, and the tenant's share delivered to him upon the farm and with the then and there intent on the part of the landlord that the portion so delivered to the tenant should be the tenant's share of the crop, irrespective of the fact that no settlement had been had, and that the landlord might have withheld until final settlement the possession of all or a part of the tenant's portion of the grain. Was a delivery made by the landlord to the tenant of the one half of the grain after its division, and with the intent that the grain delivered should be marketed and sold by the tenant as his property? The answer to this question decides the case. If the proof raises an issue of fact on this question, the dismissal of the action was erroneous, and the case should have been submitted to the jury upon the evidence touching such question.

The tenant testifies and the intervener admits that both were present at the threshing, which was in November, very late in the season; that a physical division of the grain raised was made at the machine, exactly one half being taken by each, the tenant's share being placed in his granary on the farm and the landlord's in a separate bin near the machine; and that such equal division was made by the thresher, to the knowledge and acquiescence, and presumably under the direction, of both the tenant and landlord, present; that the tenant, who under the terms of the lease was obliged to market the landlord's share free of charge, soon after threshing started hauling his own grain and drew 9 or 10 loads to the elevators; that at all times the landlord was living

on the place closely adjacent to the house in which the tenant and family resided. He knew that the tenant was marketing said one half of the grain as his, the tenant's, grain, and that the tenant was taking elevator slips for the wheat in his own name. These slips in evidence show that the hauling of the tenant's share took at least ten days. The tenant testifies that some three or four times or more he showed the tickets to the landlord during conversations upon whether the weights were holding out with the threshing machine measure, and that the landlord never made any objection to the hauling or the placing of it in the elevator in the tenant's name, and that he, tenant, supposed he was hauling his own wheat, and that the final division of it had been made at the machine. Intervener does not claim to have notified Benson to store the grain, or to have given any direction concerning it, or to have attempted any control of what Benson was doing with it. That as soon as Benson had his share hauled he turned the slips evidencing its delivery to these elevators over to the plaintiff bank, and authorized them to collect from the elevators and apply the proceeds on his mortgage to them, concededly for more than the amount of all the grain marketed. The tenant says he sold one or two loads to get money to pay the threshing bill, and paid his share of that out of his one half of the grain, or the part of it so sold. That after marketing his share of the grain he hauled the landlord's one half to market. What he himself did not haul of this, he furnished his team to haul, which Whitmore drove. Thus he fulfilled his agreement to market the landlord's share of the grain. Where the landlord's share was marketed does not appear. He admits, however, that after the first load of the tenant's portion was hauled he, the landlord, unknown to Benson, went to the elevator and found out that the tenant was placing it in store in his own name, but made no objection to that, and never questioned the tenant's right to handle his part of the grain as he did, nor did he notify the elevators that he had any interest in the grain until six weeks after the hauling and long after this suit had been begun, and some time in December. The tenant testifies that he complied in every respect and fully with every condition of his lease, and his attorney took up each separate stipulation therein and proved a compliance with it in fact, excepting one provision wherein the tenant agreed to haul out manure that had

accumulated from some years back, as well as that made during the year 1912. As to this clause of the contract it is admitted that all of the manure accumulating during Benson's occupancy of the premises was hauled and spread upon the land, together with about 200 loads of old manure, evidently the accumulation of years; that about an equal amount of old manure was left unhauled, but he states the reason it was not hauled and spread was that Whitmore stopped him hauling it, and set him to work instead upon a basement that he was having dug or built. The tenant also admits that during the summer Whitmore furnished 200 bushels of speltz, worth 67 cents a bushel, and a stove worth \$47, and did some work for him, and also furnished him 200 pounds of flour and some pork, worth \$11, making a total account against him of upwards of \$200. The court permitted a close and searching cross-examination as to all such items, and permitted the defense great latitude in showing them, evidently to show that no settlement had been made, a fact that was conceded. Benson thereupon attempted to show various offsets against such account in board furnished Whitmore during the summer for thirteen weeks, at the reasonable value of \$45; a team furnished him, at his request, for twenty-three days, reasonably worth \$46; \$40 for work and services rendered him in cutting grain in which the tenant was not interested; \$40 for hauling stone and other services rendered him and other charges, all aggregating \$279, "offered for the purpose of showing that Benson was not indebted in any manner or under any conditions to the plaintiff in intervention." This testimony offered both by questions and offer of proof was excluded. Under the issues as framed and tried, its rejection constituted reversible error. The offered testimony was admissible (1) as bearing upon the extent of the property interest of the intervener in the wheat in dispute, he having asked in his complaint that it be determined, and that he be given a lien upon and be adjudged to be entitled to the possession of the grain to pay himself the amount of his claims therein, and (2) it was admissible for and as having a bearing directly upon the question of whether when this wheat was thus divided and suffered to be marketed by the tenant as his own he, intervener, either could or would in all probability make any claim thereto. If the tenant was owing him nothing, but instead the indebtedness was

the other way, and with the tenant then bound by said contract to farm the land another year or more, there would be little reason for a settlement or anything more than a physical division of the grain. Upon these facts the jury could reasonably have concluded that the division made was, under all the circumstances, intended as an absolute one, and that the delivery at the machine of the exact one half of the grain to the tenant clothed the latter with title to the property he received. And if so, the plaintiff's mortgage then and there attached, and plaintiff should have prevailed.

Respondent urges that the most that has been shown was an equitable right to a division which a court would recognize in an action for an accounting, but that in the absence of an agreed settlement it must be held that the title remained in the landlord irrespective of the tenant's right to a division. Such is not the law under the facts peculiar to this case. The landlord has agreed, "upon reasonable request thereafter made, to give, release, and deliver to said party of the first part the one half of all grain so raised and secured from said farm during said season, or the proceeds thereof, if sold, after deducting from such share any charges, costs, or disbursements incurred and made by said party of the second part." He has agreed that the title retained by him to all of the grain shall remain in him until he shall thus release and deliver the one half of said grain "or the proceeds thereof, if sold." True he might have retained all the title until after a sale of the grain, in which event such mortgage never would have attached to any of the grain and he could have divided the proceeds, and the case would have been within the holding in *Bidgood v. Monarch Elevator Co.* 9 N. D. 627, 81 Am. St. Rep. 604, 84 N. W. 561; *Hermann v. Minnesota Elevator Co.* 27 N. D. 235, 145 N. W. 821, and other cases. But when the landlord elects to adopt the other alternative, *i. e.*, *divide the specific grain and set apart the tenant's portion to him without any deductions* for advances, and delivers the same to the tenant with intent that the tenant shall own the same as his share of the grain raised, just at that moment of delivery the lien of any mortgage otherwise in abeyance attaches, because the specific property has been set aside to the tenant, vesting title in him, and comes into existence so far as the mortgage is concerned. Thus the landlord may divide the grain, and deliver the

tenant his share free of any charge for advancements, and waive any rights under the lease to longer retain the tenant's share, and thereby invest the tenant with title to his share. And the question of fact is whether that was not exactly what was done in this case. The evidence seems to preponderate to that effect. Had the verdict been directed the other way, it is doubtful if it should have been disturbed had the proof been as it is. The trial court evidently went astray by assuming, as contended by respondent, that the title could not vest in the tenant to his share of the crop until after a settlement, overlooking the fact that it was within the power of the landlord to at any time waive the provisions for or the lien of his contract. "That the lien of a mortgage may be waived by the mortgagee cannot be questioned, and such lien may be waived by parol. *Stone v. Fairbanks & Co.* 53 Vt. 145; 25 Cyc. 673. And it may be impliedly waived by conduct of the lienholder inconsistent with the existence of a lien. 25 Cyc. 674," quoted from *Van Gordon v. Goldamer*, 16 N. D. 323, at 328, 113 N. W. 609. And all testimony tending to show that the intervener waived his lien is necessarily admissible, if otherwise competent, including testimony tending to establish the value of the property and the extent of any interest or noninterest of intervener therein. *Wadsworth v. Owens*, 17 N. D. 172-177, 115 N. W. 667. And intervener having asked that the extent of his interest be determined and that he have the property because thereof, it was entirely proper for plaintiff to show either the extent of such interest, or that the intervener in fact had no claim against the tenant which was not already more than offset by the tenant's claims against him. As is said in *Wadsworth v. Owens*: "If the facts should develop on another trial that the title was to be in the plaintiff until a division of the crop, that fact would not warrant a judgment in plaintiff's favor for the full value of the crop. The rights of the parties after the right to the possession is determined are to be determined on equitable principles. This court has so held in an action similar to this one. Although the plaintiff may be entitled to the right to the possession of the crop, that would not mean that the defendant [the tenant] had no interest in the crop. The plaintiff would be entitled to the possession thereof only to the extent of his interest therein, and the verdict should show what that interest is in view of the contract of the

parties. That is the decision of this court in *Angell v. Egger*, 6 N. D. 391, 71 N. W. 547, and the principle there laid down was recently sustained in *Aronson v. Oppgard*, 16 N. D. 595, 114 N. W. 377." The same principle applies between the intervener, the landlord, and the mortgagee, the tenant's assignee. That those actions are in replevin is not important, as in an action in conversion the mortgagee can recover only the amount of his special interest in the property converted. *Lovejoy v. Merchants' State Bank*, 5 N. D. 623, 67 N. W. 956. "The plaintiff (in conversion) can only recover to the extent of his actual loss." "If the case is such that the plaintiff can be fully compensated by a sum of money less than the full value of the property which was converted, the recovery will be limited to the amount that will suffice for complete indemnity. The plaintiff will be confined to compensation commensurate with the actual injury." 5 N. D. 625, 626; *Hanson v. Skogman*, 14 N. D. 445, 105 N. W. 90. See also *Force v. Peterson Mach. Co.* 17 N. D. 220, 116 N. W. 84, explaining *Lovejoy v. Merchants' State Bank*, supra, and stating that the right of equitable set-off in conversion actions exists independently of statute. If the extent of the landlord's claims against the tenant be but twenty-five or fifty dollars, he should not in any event be permitted to recover more than the amount necessary to make him whole. Under no version of the testimony can it be said that there was not at least a sufficient issue of fact to carry the case to the jury, that they might determine whether this property was set aside as and delivered to the tenant as his property absolutely; and should the jury find against the plaintiff on that issue it should also be required to find the amount of the landlord's interest in the grain in suit, if any, by determining the amount owing the landlord from the tenant, if any. It is to be noticed that plaintiff's reply puts in issue the allegations of intervener's complaint, that "this intervener advanced money to said Benson in the sum of about \$200, *no part of which has been paid* . . . and that the stipulations of said contract have been broken . . . and the said Benson is indebted to intervener in the sum of \$600 for money advanced, plowing not done, feed furnished, and grain not delivered; for which he has a lien superior to all other liens or mortgages on said grain." Intervener has placed these matters in issue as the basis for his claim of lien, and has been

allowed to support them with proof, while plaintiff has been denied the right to disprove them or show his version of the circumstances from which the jury may have concluded that but a trifling indebtedness existed from the tenant to the intervener. Such was the effect of the exclusion of the offered testimony.

In conclusion on retrial, should the jury find a division and delivery thereon intended to and passing title was made, it will find for the plaintiff and against defendants and intervener, and thereby decide all issues. Should it find that, though a physical division had been made, yet no delivery thereunder vesting title had been intended and that title to the grain was not in Benson, it will not find for dismissal of plaintiff bank's action, but will find the amount of any indebtedness due from Benson to intervener; such indebtedness with intervener's costs will be paid from the proceeds of the wheat, and any balance will be ordered turned over to plaintiff bank to apply on its mortgage indebtedness, inasmuch as the elevator defendants have tendered the proceeds into court for direction as to application. The reasons for this disposition are obvious. The tenant makes no claim, but concedes the validity of plaintiff's mortgage and has so testified. If intervener recovers of the elevators, he can only recover, to the amount of his actual damage, the extent of his tenant's indebtedness to him, leaving possibly nearly all or the greater part of the wheat unclaimed by defendants and subject to division by the court under the pleadings and claims of the respective parties. Needless to say no amendment of pleadings to change such possible results should be permitted on a retrial after this adjudication of the rights of the parties on their pleadings.

The elevator companies have refused possession of the grain on demand therefor, and have technically converted it, but in reality are mere stakeholders, and no costs on trial or on appeal will be taxed against them. Plaintiff will recover costs on appeal against the intervener in both suits; costs on trials had and on retrial to abide results of the new trials awarded. The judgments appealed from are ordered set aside and new trials granted, and the causes are remanded for further proceedings.

TOLERTON & WARFIELD COMPANY, a Corporation, v. G. H.
SULT and W. W. Austin, Copartners, as Marmarth Mercantile
Company.

(156 N. W. 939.)

Book account — balance — action to recover — pleading and proof — variance between — complaint — answer — neither amended — trial — issues — defined by the evidence — construction.

1. Where, in an action to recover a balance claimed to be due upon a book account, the plaintiff attaches to its complaint and makes a part thereof an account which begins on the 5th day of March, 1909, but, in proving his case and in his evidence in chief, proves the account as beginning at an earlier date, namely, the 14th day of August, 1908, and the point at issue in the case is whether a sale alleged to have been made prior to the 5th day of March, 1909, was actually made, and no permission has been asked to amend the complaint, and no amended answer has been requested, the issues will be presumed to be defined by the evidence, and the case will be treated as if the whole account had been sued upon and a general denial had been interposed.

Book account — balance — action to recover — proof — recovery when.

2. Where in an action for the recovery of a general balance upon a book account upon which a payment is admitted, the full balance cannot be recovered without proof of all of the items of debt.

Mistake — specially pleaded — rule as to — admission — explanation — payment.

3. The rule that mistake must be specially pleaded does not apply where a person merely seeks to explain an apparent admission and to show his intention in making a payment.

Opinion filed February 16, 1916.

Appeal from the District Court of Bowman County, *Crawford, J.*
Action to recover a balance on a book account. Judgment for defendants. Plaintiff appeals.

Affirmed.

Statement of facts by BRUCE, J.

This is an action for a balance claimed to be due on an open account. The complaint alleges: "That, at various times between the

5th day of March, A. D. 1909, and the 21st day of March, A. D. 1910, inclusive, the defendants, acting as copartners under the firm name of Marmarth Mercantile Company, purchased of the plaintiff and plaintiff sold to the defendants certain goods, wares, and merchandise upon account, for which goods, wares, and merchandise the defendants promised to pay the plaintiff at certain times prior to the date of the commencement of this action, the sum of \$1,180.75. 3. That plaintiff has, prior to the date of the commencement of this action and after the same became due and payable, demanded and caused to be demanded of the defendants that they pay the said sum, but that the defendants have not paid the same, except that, at various times defendants have paid divers sums to apply on the said account, aggregating the sum of \$1,005.23. 4. That there is now unpaid upon the said account and due from the defendants to the plaintiff thereon, the sum of \$175.52. 5. That a true and correct statement of the said account is hereto attached and hereby made a part of this complaint and marked 'plaintiff's exhibit A.' Wherefore the plaintiff demands judgment against the defendants for the aforesaid sum of \$175.52, together with the costs and disbursements of this action."

The answer is as follows: The defendants admit that at various times they have bought goods, wares, and merchandise from the said plaintiffs, but not of the amount stated in plaintiffs' complaint. 2. That said defendants have paid the said plaintiffs for said goods, wares, and merchandise purchased by them from said plaintiffs, and that they are not in any manner or in any amount whatever indebted to said plaintiffs, but that they have paid said plaintiffs in full for all goods, wares, and merchandise purchased by said defendants from said plaintiffs.

The jury found for the defendants, and from a judgment for dismissal and for the costs of the action the plaintiff appeals.

Theo. B. Torkelson, for appellant.

The mere fact that there is a slight variance between the complaint and the proof, and such proof is offered without objection, will not allow or warrant the defendant in offering testimony relating to irrelevant matters. Jones, Ev. 2d ed. § 171, p. 192; Mulroy v. Jacobson, 24 N. D. 365, 139 N. W. 697.

A mere receipt can ordinarily be disputed by parol evidence; but where the receipt purports to be a full compromise or settlement of the claim, such proof will not be admitted in proof of other terms. Such a document is contractual in its nature. Jones, Ev. 2d ed. § 492, p. 621; Vallancey v. Hunt, 20 N. D. 579, 34 L.R.A.(N.S.) 473, 129 N. W. 455.

Money paid by mistake forms the basis of a specific cause of action. Nollman v. Evenson, 5 N. D. 344, 65 N. W. 686; Dickey County v. Hicks, 14 N. D. 73, 108 N. W. 423; James River Nat. Bank v. Weber, 19 N. D. 702, 124 N. W. 952; Rev. Codes 1905, § 680, Comp. Laws 1913, § 7449.

The burden of proof is not always upon the plaintiff in a civil action. It may shift from one party to the other during the trial. Jones, Ev. 2d ed. pp. 204 et seq.; Star Wagon Co. v. Matthiessen, 3 Dak. 233, 14 N. W. 107; Lokken v. Miller, 9 N. D. 512, 84 N. W. 368; Satterlund v. Beal, 12 N. D. 122, 95 N. W. 518; Olson v. Day, 23 S. D. 150, 120 N. W. 883, 20 Ann. Cas. 516; Jones, Ev. 2d ed. § 176; note 16, § 179, note 17, § 492, note 29.

Instructions which are misleading because assuming as properly in evidence matters which are not, are erroneous and constitute prejudicial error. Dinnie v. Johnson, 8 N. D. 153, 77 N. W. 612; Roberts v. First Nat. Bank, 8 N. D. 474, 79 N. W. 993; Bockoven v. Lincoln Twp. 13 S. D. 317, 83 N. W. 335; Rossiter v. Boley, 13 S. D. 370, 83 N. W. 428; Aldous v. Olverson, 17 S. D. 190, 95 N. W. 917.

Emil Scow, for respondents.

In an action to recover a balance due upon a book account, evidence of the entire transaction is admissible. Tucker v. Quimby, 37 Iowa, 17; Lamb v. Hanneman, 40 Iowa, 41; Fitzpatrick v. Harris, 8 Ala. 32; Dougherty v. Knowlton, 19 Ill. App. 283; 1 Cyc. 475.

Any evidence which tends to combat the correctness of plaintiff's claim is admissible, in an action on an account. 1 Cyc. 478; Kehl v. Smith, 87 Wis. 212, 58 N. W. 244; Northern Grain Co. v. Pierce, 13 S. D. 265, 83 N. W. 256.

The account here is not admitted, and in the discretion of the court, the entire account or transaction between the parties was open to investigation as bearing on the question of whether or not there was anything

due from defendant. *Miller v. Carnes*, 95 Minn. 179, 103 N. W. 877; *Buckeye Buggy Co. v. Dickey*, 122 Ga. 290, 50 S. E. 66; *Satterlund v. Beal*, 12 N. D. 122, 95 N. W. 518; *Lokken v. Miller*, 9 N. D. 512, 84 N. W. 368; *Olson v. Day*, 23 S. D. 150, 120 N. W. 883, 20 Ann. Cas. 516.

To shift the burden of proof, the defendant's admission must extend not only to the admission of an indebtedness, but also to the amount thereof. *Coats v. Gregory*, 10 Ind. 345.

In an action on account and note, less admitted credits, the burden is on plaintiff to prove that both are due and owing, and defendant is entitled to an instruction to that effect. *Laubheimer v. Naill*, 88 Md. 174, 40 Atl. 888.

Where a party denies liability on a certain item in an account, a credit thereon cannot be properly applied without his consent. *Bay City Iron Co. v. Emery*, 128 Mich. 506, 87 N. W. 652; *Huffstater v. Hayes*, 64 Barb. 573; *Allen v. Brow*, 11 Tex. 520.

A verdict on conflicting evidence is conclusive on the appellate court. *Olson v. Day*, 23 S. D. 150, 120 N. W. 883, 20 Ann. Cas. 516.

BRUCE, J. (after stating the facts as above). Although the book account which was attached to and made a part of the complaint ostensibly begins on March the 5th, 1909, such account, in fact, was of earlier origin, and plaintiff, in order to make out its case and in order to avoid a payment which was made on May 29, 1909, disregarded its pleadings, and proved such account from its inception on the 14th day of August, 1908. In this new account was an item of some \$182.82, which was alleged to have been sold to the defendants on the 29th day of January, 1909, and to the payment of which plaintiff sought to apply the payment of May 29, 1909. The whole controversy, therefore, arises over the question of whether on the 29th day of January, 1909, and prior to the said March 5, 1909, the plaintiff sold to the defendants a certain bill of goods, or whether such goods were, in fact, sold to a third party (Harrison), the defendants only agreeing to act as collecting agents.

The principal assignment of error is that the court erred in instructing the jury that "in a civil action, before the plaintiff can recover, he must prove by a fair preponderance of the evidence the allegations of

the complaint. That is, it places upon the plaintiff the burden of showing that he sold and delivered the goods to the defendants and defendants still owe him." The plaintiff maintains that "the jury should have been instructed that the defendants had pleaded payment, and that therefore the burden of proof was upon them to show by a fair preponderance of the evidence the facts upon which they relied as constituting such payment."

Whether this would have been the fact or not under the case as originally presented by the pleadings, it is not necessary for us to determine. Nor is it necessary for us to criticize the somewhat informal answer which was filed in this case, and to say whether it contains both a general denial and a plea of payment or a plea of payment merely. All that it is necessary for us to say is that, in presenting its case, the plaintiff departed from its pleadings and introduced an entirely different account, and that, as no amendment to the pleadings was asked and no request made that the defendant should answer the new account which was sued upon, it must be presumed that the same was generally denied, and that, such being the case, the burden of proof to prove its account was upon the plaintiff.

Attached to the original complaint and made a part of it was an account which began on the 5th day of March, 1909. Plaintiff, however, when it presented its case and in order to avoid a payment which it knew had been made on May the 29th, 1909, but for which it had given no credit in its account as originally filed, proved as a part of its own case the entire account from its inception on the 14th day of August, 1908, so as to be able to include therein the alleged sale on January 29, 1909, in the payment of which it sought to apply and to extinguish the remittance made on the 29th day of May, 1909, and thus leave to itself a balance of some \$175.72 due on the account from the 5th day of March, 1909.

In doing this, plaintiff practically interposed a new account and a new complaint. The issues were defined by the evidence. A denial would be presumed by the law, and under these issues the burden of proof was upon the plaintiff. *Mott v. Baxter*, 29 Colo. 418, 68 Pac.

220; Pom. Code Rem. 3d ed. §§ 629, 700; *Quinn v. Lloyd*, 41 N. Y. 349; *Brown v. Forbes*, 6 Dak. 273, 43 N. W. 93; *Powers v. Russell*, 13 Pick. 69; *Chicago, C. & L. R. Co. v. West*, 37 Ind. 211; *Fish & H. Co. v. New England Homestake Co.* 27 S. D. 221, 130 N. W. 841; *Hudson v. Hudson*, 119 Ga. 637, 46 S. E. 874; 31 Cyc. 460.

"In an action on an account plaintiff's account is not in its nature self-proving. . . . While as a general rule the burden of proving a negative averment is not upon plaintiff, yet . . . in an action on an open account for services plaintiff does not make [out] a case merely by showing . . . [the delivery of the goods and the value thereof]. Where the action is for the recovery of a general balance . . . [upon a book account] upon which a payment is admitted, the full balance cannot be recovered without proof of all the items of debt, because there is no authority in such a case to apply the payments to any particular items of the account." 1 C. J. 661, 662; *Huffstater v. Hayes*, 64 Barb. 573; *Allen v. Brown*, 11 Tex. 520.

Here the complaint was for a balance due on a book account, and contained negative averments of nonpayment which a denial, general or specific, would have put in issue. See *Brown v. Forbes*, 6 Dak. 273, 43 N. W. 93; *Quinn v. Lloyd*, 41 N. Y. 349; *Mott v. Baxter*, 29 Colo. 418, 68 Pac. 220; Pom. Code Rem. 3d ed. § 700; *Knapp v. Roche*, 94 N. Y. 329. The plaintiff proved as a part of its case, and sought to recover upon an account, the date of origin of which was prior to the account sued upon. It asked for no new pleadings and went to trial on the new issue presented by it. A denial must be presumed, and the burden of proof was upon the plaintiff. This is not a case where a plea of payment was necessary and in which the burden of proof was therefore cast upon the defendant to sustain it. A plea of payment is only necessary where it interposes new matter. *Brown v. Forbes*, 6 Dak. 273, 43 N. W. 93; *Sylvis v. Sylvis*, 11 Colo. 319, 17 Pac. 912; *Mott v. Baxter*, 29 Colo. 418, 68 Pac. 220. In the case at bar, indeed, the new matter was sought to be interposed by the plaintiff, and not by the defendant.

Nor is there any merit in plaintiff's objection to the question, "Now

in the deposition taken here you find a statement that on January 22, 1909, the Tolerton & Warfield Company sold you merchandise consisting of a thirty-day bill of goods, \$71.65, and a sixty-day bill of goods amounting to \$6.39, and a sixty-day bill of goods amounting to \$104.88?" This question was asked one of the defendants, and was objected to on the ground that it related to a transaction between the parties prior to the time mentioned in the complaint. Plaintiff's agent, however, had not only testified to the transaction on his examination in chief, but had introduced in evidence in such examination the entire account between the parties, and which began, not on March 5, 1909, but on August 14, 1908. It was for the purpose of paying itself for this alleged account that the plaintiff had admittedly applied the payment of \$182.82 which was made on May 29, 1909. We think there can be no question that when one sues upon a book account and alleges that it begins upon a certain date, or that the payments thereon began upon a certain date, and has excluded from such account a payment made after that date, and seeks to apply it upon a subsequent transaction, proof of the entire account can be introduced and all of the payments and credits therein during its whole existence. *Lamb v. Hanneman*, 40 Iowa, 41. And so, too, it is also to be noticed that the plaintiffs in their own deposition introduced evidence of this transaction; and though we held in the case of *Mulroy v. Jacobson*, 24 N. D. 354, 139 N. W. 697, that the introduction by the defendant, without objection of letters, did not warrant the court in receiving in evidence letters or other evidence by the defendant which were objected to, we have nowhere held that a party may open the door himself and then object to evidence on the identical transaction to which he has testified, and especially when such transaction is necessarily included in his cause of action.

Nor do we think the court erred in allowing the defendants to explain their letter of May the 29th, 1909, with which the payment of \$182.82 was transmitted, and to say whether they intended the remittance to cover the Harrison bill, or merely to apply on the general account. This letter was as follows:

33 N. D.—19.

Tolerton Warfield Co.,
Sioux Cty, Ia.

Marmarth, May 29, '09.

Checked
June 1, 1909
Bookkeeper.

Gents:—

We send you ck in payt bills as follows:

\$104.88

6.29

71.65

10.65

3.25

\$196.72

We have not red a cent from the Harrison bills & as that bill was by your request you surely will be willing to allow us a little time to collect it. Your man took the acct & we objected to it & he said you would send us a cr memo for 13%.

We are truly,

Marmarth Merc. Co.

The letter, at the most, was an admission against interest. The plaintiff sought to prove by it that the defendants had, in fact, bought the Harrison bill of goods, because the items of \$104.88, \$6.29, and \$71.65 correspond with that bill. The defendants, on the other hand, contended that they merely intended to remit on the general account; that these amounts were taken from the files, and not from their books, and that when remitting it was not noticed that they related to the Harrison bills, which the defendants contended they had merely agreed to collect as agents, and not to guarantee or to assume. The rule that mistake must be specially pleaded does not apply where a person merely seeks to explain an apparent admission and to show his intention in making a payment. Nor are the defendants herein seeking to recover back money which was paid by mistake. They are merely seeking to have it properly applied.

From a perusal of the record we are not prepared to say that there

is not sufficient evidence to support the verdict, and we are satisfied that the matter was one for the jury, and not for the court, to pass upon.

The judgment of the District Court is affirmed.

**D. C. KNAPP v. MINNEAPOLIS, ST. PAUL & SAULT STE.
MARIE RAILWAY COMPANY, a Corporation.**

(156 N. W. 1019.)

New trial — after verdict directed — granting of — discretion of court — trial judge — errors — not prejudicial — supreme court — interference.

1. The granting of a new trial after a verdict has been directed by the court is a matter which is largely within the discretion of the trial judge, and such discretion will not, as a rule, be interfered with, unless no conclusion can be drawn from the evidence except one favorable to the party for whom the verdict was found, and that the errors, if any, which were committed by the trial judge were clearly not prejudicial.

Railway company — managing agent — cross-examination under the statute — foundation laid — error.

2. Error was committed by the trial judge in refusing to permit further cross-examination, under chapter 4 of the Laws of 1907, of one who was claimed to be a managing agent of a railway company, on the ground that the court could not see that the plaintiff could show such person to be a managing agent, after such witness had testified that he had been in the employ of the defendant company for twenty-one years, that during such time he had been operator, station agent, train master, live-stock agent, freight-transfer agent, assistant superintendent, and general agent; that at the time of the trial he was general agent of the company and as such general agent had charge of the business of soliciting freight up and down the line of the company, and solicited the freight from the plaintiff during the times covered by the suit, and also that he had taken part in trying to get a settlement for the plaintiff.

Freight rate — railway — point beyond terminus — tariffs — general agent — ostensible authority.

3. Where the freight rate from a certain point which lies beyond the terminus of a railway company and across a lake to certain points upon the line of the railway is advertised in the tariffs of the company as being 22 cents per one hundred pounds, such freight being usually transported across the lake on the boats or barges of an independent company to the point of beginning of said railway company, and the rate from such terminal point to the points of

destination being advertised as 17 cents, it is within the ostensible authority of a general agent of such railway company who prior to such time has induced the plaintiff to lease elevators across said lake, telling him that he could have a 22-cent rate from such point, and who prior to such time negotiated with the boat company to the end that proper transportation could be furnished to such point, after the lake has frozen up and it is impossible to transport the grain by said barges or boats and after a 22-cent rate has been given to such plaintiff, to agree with such plaintiff that, if he will haul the grain to the railway station himself for further transportation, the company will pay him 5 cents per bushel for such hauling.

Railway company — freight rates — grain elevators — terminal points — reasonable compensation — Interstate Commerce Commission.

4. Where a railway company has a station on the shores of a lake, and across said lake are grain elevators from which it has been the custom of the company to give a rate of 22 cents per hundred pounds to terminal points upon its line within another state, it being the custom to transport the grain across said lake upon the boats of an independent company, and when the railway company has given to the owner of such elevators such 22-cent rate, and agreed to transport the grain from such elevators to the points of destination for the said sum, but later, on account of the freezing of the waters of the lake, it becomes impossible to operate the boats, it is not a violation of § 6 of the interstate commerce act of June 29, 1906 (34 Stat. at L. 587, chap. 3591, Comp. Stat. 1913, § 8597), which prohibits unlawful discrimination, for such railway company to agree with the shipper that if he himself will haul the grain across the lake to the station of the company it will pay to such shipper 5 cents a bushel for such hauling, provided that such rate is not an unreasonable compensation for such hauling and the court will not hold such allowance of 5 cents per bushel to be unreasonable, in the absence of proof or of a ruling of the Interstate Commerce Commission to that effect.

Opinion filed February 23, 1916.

Action to recover on a contract for hauling freight, *Buttz, J.* Appeal from the District Court of Burke County from an order setting aside a judgment and granting a new trial after a verdict had been directed for the defendant. Defendant appeals.

Order granting new trial affirmed.

Statement by BRUCE, J.

This action was brought to recover \$481.83 and interest claimed to be due under a contract by which the defendant agreed to pay the plaintiff 5 cents a bushel for hauling wheat from Boscurvis, Saskatche-

wan, Canada, and Paisley and Newport, North Dakota, to the depot or shipping tracks of the defendant railway company at Kenmare, North Dakota. Kenmare was the starting point of the railway company, and Boscurvis, Paisley, and Newport were situated some distance north of that point on the Des Laes lake. It is admitted that 8,836 bushels of wheat were hauled by the plaintiff and delivered to the railway company for shipment, and that the wheat was shipped over the defendant's road from Kenmare to points in Minnesota, and that therefore the contract of shipping was an interstate contract. At the close of the taking of testimony a motion was made by the defendant for a directed verdict on the ground that there was no evidence showing the authority of one Cole to make the contract in question, and upon the further ground that the contract, if made, would be a violation of the interstate commerce law, which would subject both the plaintiff and the defendant to prosecution. The court granted the motion and directed a verdict for the defendant, and thereupon judgment was entered in favor of the defendant dismissing the action.

Thereafter the plaintiff made a motion for a new trial upon the following grounds: (1) That the court erred in sustaining defendant's objection to the examination of the witness, W. A. Cole, general agent for the defendant, on his cross-examination; (2) that the court erred in advising and directing the jury to return a verdict in said action in favor of the defendant and against the plaintiff; (3) that the court erred in sustaining defendant's objection to different questions propounded by the plaintiff to witnesses through the trial; (4) that the court erred in overruling the plaintiff's objections to different and divers questions propounded by the defendant. This motion for a new trial was granted, and this appeal is taken from the order granting the same.

Palda, Aaker, & Greene (Alfred H. Bright and John L. Erdall, of counsel), for appellant.

The agreed freight rate from Kenmare to Minnesota points was 17 cents per 100 pounds. The rate from the lake points was 22 cents per 100 pounds. The alleged contract with the plaintiff for an allowance of 5 cents per bushel for hauling from the lake points to Kenmare amounts to a rebate of 2 cents per 100 pounds, from the established schedule of tariffs, and is in violation of the interstate commerce act as

amended. 34 Stat. at L. 587, chap. 3591, Comp. Stat. 1913, § 8597; Fed. Stat. Anno. 1909 Supp. pp. 262, 263; N. D. Codes, §§ 5870, 5874, 5878 and 5922.

George A. Gilmore and F. B. Lambert, for respondent.

A station agent for a railroad company, authorized to sell and collect for passenger tickets, and to receive and deliver freight and to collect for freight shipments, is sufficient of a managing agent within the meaning of the statute, to make service of summons upon him, in a civil action against a railroad company, service upon such corporation. *Brown v. Chicago, M. & St. P. R. Co.* 12 N. D. 61, 102 Am. St. Rep. 564, 95 N. W. 153, 14 Am. Neg. Rep. 169; *Porter v. Chicago & N. W. R. Co.* 1 Neb. 14; *American Exp. Co. v. Johnson*, 17 Ohio St. 641; *Foster v. Charles Betcher Lumber Co.* 5 S. D. 57, 23 L.R.A. 490, 99 Am. St. Rep. 859, 58 N. W. 9.

"Managing agent" should be construed to include an agent of a railroad company described as its "general passenger agent, etc." *Tuchband v. Chicago & A. R. Co.* 115 N. Y. 437, 22 N. E. 360; *Palmer v. Chicago Herald Co.* 70 Fed. 888; *Palmer v. Pennsylvania*, 35 Hun, 369; *Klopp v. Creston City Guarantee Waterworks Co.* 34 Neb. 808, 33 Am. St. Rep. 666, 52 N. W. 819; *Blanc v. Paymaster Min. Co.* 95 Cal. 524, 29 Am. St. Rep. 157, 30 Pac. 765; *Hampson v. Weare*, 4 Iowa, 13, 66 Am. Dec. 121.

Such agent may, therefore, be called by the adverse party for cross-examination under the statute, and the corporation is bound by his testimony. Comp. Laws 1913, §§ 7863, 7870.

In order to urge the illegality of a contract when such illegality does not appear either upon its face or in the plaintiff's evidence necessary to prove the same, the defendant must specifically allege such illegality. Neither of these conditions appeared in this case, and hence it was error to direct a verdict on such ground. *Frankel v. Hillier*, 16 N. D. 387, 113 N. W. 1067, 15 Ann. Cas. 265.

Where a party claims a privilege under a statute, it is necessary to plead and prove that the party comes under such statute. *Bullard v. Northern P. R. Co.* 10 Mont. 168, 11 L.R.A. 246, 3 Inters. Com. Rep. 536, 25 Pac. 120.

Agency is a question of fact. *Corey v. Hunter*, 10 N. D. 5, 84 N. W. 570.

Whether the relation of principal and agent exists is a question of fact for the jury. 2 *Thomp. Trials*, 2d ed. §§ 1368, 1377; *Reid v. Kellogg*, 8 S. D. 596, 67 N. W. 687.

A principal cannot take the benefits and repudiate an unauthorized agency. *Wyckoff v. Johnson*, 2 S. D. 91, 48 N. W. 837; *Union Trust Co. v. Phillips*, 7 S. D. 225, 63 N. W. 903.

Ratification of part of an individual transaction is a ratification of the whole. *Comp. Laws* 1913, § 5764.

The freight charge here questioned was just and reasonable, and this is all the law demands. *Fed. Stat. Anno.* 1909 *Supp.* p. 266, 34 *Stat.* at L. 589, chap. 3591.

But no one shall be given an undue preference. *Cincinnati, N. O. & T. P. R. Co. v. Interstate Commerce Commission*, 162 U. S. 184, 40 L. ed. 935, 5 *Inters. Com. Rep.* 391, 16 *Sup. Ct. Rep.* 700; *Interstate Commerce Commission v. Baltimore & O. R. Co.* 145 U. S. 263, 36 L. ed. 699, 4 *Inters. Com. Rep.* 92, 12 *Sup. Ct. Rep.* 844.

The defense of *ultra vires* cannot be raised unless the act is directly prohibited by law, and especially when the corporation has accepted and retained the benefits of its contract. *Tourtlot v. Whithed*, 9 N. D. 467, 84 N. W. 8; *Hunt v. Northwestern Mortg. Trust Co.* 16 S. D. 241, 92 N. W. 23.

In cases of doubt, where relief is sought in the interest of the carrier, the construction will be against the carrier. *Interstate Commerce Commission v. Louisville & N. R. Co.* 73 *Fed.* 409, citing *Interstate Commerce Commission v. Baltimore & O. R. Co.* 3 *Inters. Com. Rep.* 192, 43 *Fed.* 51.

The rate must be not only reasonable, but it must be equal and uniform, taking into consideration the time, kind, and circumstances of the transaction. The object of the statute is to prevent one shipper from getting the advantage over his competitor in the matter of rates only where they both make substantially a like offering to the carrier. *United States v. Hanley*, 71 *Fed.* 673.

The burden of proof rests upon the party alleging the existence of an undue preference or advantage. *Interstate Commerce Commission v.*

Baltimore & O. R. Co. 3 Inters. Com. Rep. 192, 43 Fed. 37; Interstate Commerce Commission v. Louisville & N. R. Co. 73 Fed. 409; Denaby Main Colliery Co. v. Manchester, S. & L. R. Co. L. R. 11 App. Cas. 97, 55 L. J. Q. B. N. S. 181, 54 L. T. N. S. 1, 50 J. P. 340, 6 Eng. Ry. & C. Traffic Cas. 133.

The burden of proof is upon the complaining carrier to show a discrimination within the statute. Oregon Short Line & U. N. R. Co. v. Northern P. R. Co. 4 Inters. Com. Rep. 249, 51 Fed. 465; Interstate Commerce Commission v. Louisville & N. R. Co. 73 Fed. 409.

It has been held that, in an action for damages for charging unreasonable rates, the published schedule rate is conclusively taken as a reasonable rate, and if no more is charged, there can be no recovery. Van Patten v. Chicago, M. & St. P. R. Co. 81 Fed. 545; Interstate Commerce Commission v. Alabama Midland R. Co. 168 U. S. 169, 42 L. ed. 423, 18 Sup. Ct. Rep. 45.

Adequate consideration for reduced rates prevents such rates from constituting unjust discrimination. Interstate Commerce Commission v. Baltimore & O. R. Co. 145 U. S. 281, 36 L. ed. 705, 4 Inters. Com. Rep. 92, 12 Sup. Ct. Rep. 844; Interstate Commerce Commission v. Texas & P. R. Co. 4 Inters. Com. Rep. 114, 52 Fed. 187.

A rebate, drawback, or special rate is not of itself unjust discrimination; for it does not necessarily follow that a like rebate, drawback, or special rate has not been extended to all the patrons of the carrier. United States v. Hanley, 71 Fed. 673; United States ex rel. Morris v. Delaware, L. & W. R. Co. 2 Inters. Com. Rep. 617, 40 Fed. 101.

The law does not prohibit all discrimination, but only such as is undue or unreasonable, under the circumstances of the case. Interstate Commerce Commission v. Texas & P. R. Co. *supra*; Oregon Short Line & U. N. R. Co. v. Northern P. R. Co. 4 Inters. Com. Rep. 249, 51 Fed. 465, 4 Inters. Com. Rep. 718, 9 C. C. A. 409, 15 U. S. App. 479, 61 Fed. 158; Little Rock & M. R. Co. v. St. Louis, I. M. & S. R. Co. 4 Inters. Com. Rep. 537, 59 Fed. 402; Little Rock & M. R. Co. v. St. Louis Southwestern R. Co. 26 L.R.A. 192, 4 Inters. Com. Rep. 854, 11 C. C. A. 417, 27 U. S. App. 380, 63 Fed. 775; Interstate Commerce Commission v. Alabama Midland R. Co. 5 Inters. Com. Rep. 308, 69 Fed. 227; United States ex rel. Coffman v. Norfolk & W. R.

Co. 109 Fed. 836; Interstate Commerce Commission v. Alabama Midland R. Co. 168 U. S. 170, 42 L. ed. 424, 18 Sup. Ct. Rep. 45, (C. C. A.) 5 Inters. Com. Rep. 685, 21 C. C. A. 51, 41 U. S. App. 453, 74 Fed. 715; Denaby Main Colliery Co. v. Manchester, S. & L. R. Co. (1880) 3 Eng. Ry. & C. Traffic Cas. 426; Phipps v. London & N. W. R. Co. [1892] 2 Q. B. 229, 61 L. J. Q. B. N. S. 379, 66 L. T. N. S. 721, 8 Eng. Ry. & C. Traffic Cas. 83; Cincinnati, N. O. & T. P. R. Co. v. Interstate Commerce Commission, 162 U. S. 184, 40 L. ed. 935, 5 Inters. Com. Rep. 391, 16 Sup. Ct. Rep. 700; Texas & P. R. Co. v. Interstate Commerce Commission, 162 U. S. 197, 40 L. ed. 940, 5 Inters. Com. Rep. 405, 16 Sup. Ct. Rep. 666; Palmer v. London & S. W. R. Co. L. R. 1 C. P. 593, 35 L. J. C. P. N. S. 289, 12 Jur. N. S. 926, 15 L. T. N. S. 159, 15 Week. Rep. 11; Interstate Commerce Commission v. Louisville & N. R. Co. 73 Fed. 409; United States v. Tozer, 39 Fed. 369.

A carrier may protect itself against physical disadvantages. Detroit, G. H. & M. R. Co. v. Interstate Commerce Commission, 21 C. C. A. 103, 43 U. S. App. 308, 74 Fed. 832, affirmed on other points in 167 U. S. 644, 42 L. ed. 309, 17 Sup. Ct. Rep. 986; Interstate Commerce Commission v. Chicago G. W. R. Co. 209 U. S. 108, 52 L. ed. 705, 28 Sup. Ct. Rep. 493.

There is no power vested to declare an established or proposed rate unreasonable, or enjoin its enforcement prior to the decision of the Commission. Potlatch Lumber Co. v. Spokane Falls & N. R. Co. 157 Fed. 588; Great Northern R. Co. v. Kalispell Lumber Co. 91 C. C. A. 63, 165 Fed. 25; Atlantic Coast Line R. Co. v. Macon Grocery Co. 92 C. C. A. 114, 166 Fed. 206; Meeker v. Lehigh Valley R. Co. 162 Fed. 354; Southern R. Co. v. Tift, 206 U. S. 428, 51 L. ed. 1124, 27 Sup. Ct. Rep. 709, 11 Ann. Cas. 846.

The Interstate Commerce Commission has exclusive jurisdiction as to the reasonableness of rates or charges. Columbus Iron & S. Co. v. Kanawha & M. R. Co. 171 Fed. 713; Houston Coal & Coke Co. v. Norfolk & W. R. Co. 171 Fed. 723, 101 C. C. A. 626, 178 Fed. 266; Langdon v. Pennsylvania R. Co. 194 Fed. 486; L. Starks Co. v. Grand Rapids & I. R. Co. 165 Mich. 642, 131 N. W. 143; Texas & P. R. Co. v. Abilene Cotton Oil Co. 204 U. S. 426, 51 L. ed. 553, 27 Sup. Ct. Rep. 350, 9 Ann. Cas. 1075; Meeker v. Lehigh Valley R. Co. 162 Fed.

354; *Interstate Commerce Commission v. Diffenbaugh*, 222 U. S. 42, 56 L. ed. 83, 32 Sup. Ct. Rep. 22; *Union P. R. Co. v. Updike Grain Co.* 222 U. S. 215, 56 L. ed. 171, 32 Sup. Ct. Rep. 39; *Mitchell Coal & Coke Co. v. Pennsylvania R. Co.* 230 U. S. 247, 57 L. ed. 1472, 33 Sup. Ct. Rep. 916.

BRUCE, J. (after stating the facts as above). We have repeatedly held that the granting of a new trial for insufficiency of the evidence to support a verdict is within the trial court's discretion unless no conclusion can be drawn from the evidence except one favorable to the party for whom the verdict was found. *Malmstad v. McHenry Teleph. Co.* 29 N. D. 21, 149 N. W. 690. The same rule should, of course, apply where the trial court has directed a verdict and later sets it aside believing that he erred in his decision.

The first point urged by respondent as a justification for the action of the trial judge in granting a new trial is that such judge erred in unduly limiting the cross-examination under the statute of the witness Cole; and that the testimony, even as introduced and without the benefit of the cross-examination, showed the agency of the said Cole for the defendant railway company, and, therefore, that if the trial judge directed the verdict on the assumption that no agency had been proved, and therefore no contract between the said railway company and the said plaintiff, he certainly committed no error in setting aside such order and granting a new trial.

The second point urged is that the trial court erred in his construction of the Interstate Commerce act of June 29, 1906, and that if he directed the verdict on account of the provisions of such act no error was committed in reversing the order and granting a new trial. The judge's memorandum granting a new trial makes clear his position in the case. It is as follows:

Judge's Memorandum.

The order above is made on both of the grounds on which the motion is based, to wit, errors of law occurring at the trial and insufficiency of the evidence to justify a directed verdict, the court's position being that it was necessary to plead and prove the statute relied upon to defeat the claim sued upon, and that even though the question of plead-

ing and proof be waived and the interstate commerce act of June 29, 1906, be construed as alleged and proved, still the case comes within that portion of § 15 of said act found on page 266 of the 1909 Supplement of the Federal Statutes Annotated, which reads as follows: 'If the owner of property transported under this act, directly or indirectly, renders any service connected with such transportation or furnishes any instrumentalities used therein, the charge and allowance therefor shall be no more than just and reasonable.' That in construing said act the court holds that it is necessary for the party relying upon such wording of said act to allege and prove that the services connected with such transportation and instrumentalities used therein, furnished by the plaintiff, was unreasonable; that no proof of this kind was offered or received, and that in effect affirmative evidence was offered by the plaintiff in the shape of published schedules of said defendant showing that the charge made by the plaintiff was exactly that charge contained in such schedule as being a portion of the through rate to go to the Lake Barge Company, as their proportionate share of the published tariff and the presumption being that such proportional charge was reasonable. Further, the court's position is that, under the circumstances in the case, the charge made was a reasonable one, and that in all events the question of its reasonableness or unreasonableness should have been submitted to the jury.

We have no doubt that the trial court erred in refusing to allow the further cross-examination under § 7870, Comp. Laws 1913, of the witness Cole, and also in his conclusion, if such conclusion was made, that the agency of Cole for the defendant railway company was not proved. The witness Cole was called for cross-examination under the statute. He testified that at the time of the trial he was in the employ of the Soo Railway Company and had been in such employ for twenty-one years; that during such time he had been operator, station agent, train master, live-stock agent, transfer-freight agent, assistant superintendent, and general agent; that he had been transferred up and down the Soo Railway for twenty years; that at the time of the trial he was *general agent* of the company and as such had general charge of the business up and down the line in soliciting freight; that he had

charge of and solicited freight from the plaintiff in the fall of 1910 and 1911 and from points up the Des Lacs lake; that he did nothing except to suggest or something of that kind; that as a general agent he had to frequently give suggestions along that line, and that he never, after suggesting to a man, told him that he had not anything to do with it; that in the case of the particular claim he negotiated with Mr. Knapp to try to get the best settlement he could for him. Counsel for defendant objected to any further cross-examination under the statute, as there was no foundation laid. Counsel for plaintiff said: "If you will turn to chapter 4 of the 1907 Session Laws you will find the following: 'A party to the record of any civil action or proceeding, or a person for whose immediate benefit such action or proceeding is prosecuted or defended, or the directors, officers, superintendent or managing agents of any corporation, which is a party to the record in such action or proceeding may be examined upon the trial thereof as if under cross-examination at the instance of the adverse party or parties, or any of them, and for that purpose may be compelled in the same manner and subject to the rules as any other witness to testify, but the party calling for such examination shall not be concluded thereby, but may rebut it by counter testimony.'" The court said: "I can't see that you can show Mr. Cole as managing agent. Sustain the objection."

It is clear to us that the learned trial judge erred in the matter. If he erred, and the error and consequent curtailment of the right of cross-examination under the statute was at all prejudicial to the plaintiff's case, he had, of course, the right to consider the fact when exercising his discretion on the motion for a new trial.

It is clear to us, indeed, that the fact that the witness Cole was a managing agent of the defendant company had been sufficiently established, and, such being the case, that the plaintiff was entitled to freely cross-examine him as an adverse party, and under the latitude of examination which is allowed by § 7870, Comp. Laws 1913, § 7352, Rev. Codes 1905, Comp. Laws 1913, § 7972, chap. 4, Laws of 1907.

Not only did the testimony of the witness himself tend to show this managing agency, but, prior to this examination, the following exhibit had been introduced in evidence:

The Minneapolis, St. Paul, & Sault Ste. Marie Railway Company. Minneapolis, June 6, 1910. Effective June 10th, Mr. W. A. Cole is appointed general agent with office at Minot, N. D. T. E. Sands, General Freight Agent. Approved: W. L. Martin, Vice President & Traffic Manager.

This notice, it will be observed, was signed both by the general freight agent and by the vice president and traffic manager. The railroad agent at Minot testified that he had received a similar notice, had received it from the traffic department, and had acted under it. He testified that he had acted under it in his dealings with the witness Cole, and he positively testified that the position held by the witness Cole was that of "*assistant superintendent and general agent.*" See also *Tuchband v. Chicago & A. R. Co.* 115 N. Y. 437, 22 N. E. 360; *Brown v. Chicago, M. & St. P. R. Co.* 12 N. D. 61, 102 Am. St. Rep. 564, 95 N. W. 153, 14 Am. Neg. Rep. 169; *Palmer v. Pennsylvania*, 35 Hun, 369; *Klopp v. Creston City Guarantee Waterworks Co.* 34 Neb. 808, 33 Am. St. Rep. 666, 52 N. W. 819; *Blanc v. Paymaster Min. Co.* 95 Cal. 524, 29 Am. St. Rep. 157, 30 Pac. 765; *Hampson v. Weare*, 4 Iowa, 13, 66 Am. Dec. 121.

Under this state of the record, also, there is absolutely no foundation for appellant's contention that the agent Cole did not have either actual or *ostensible* authority for making the contract for the hauling of the grain in question, provided that such a contract was not forbidden by the statutory law, or was not against the public policy, and this latter question we will consider later.

Not only did the evidence before mentioned show the general agency of the said Cole, and this both in the freight and traffic departments of the road, but his previous conduct and dealings and the acquiescence by the company in them, and their subsequent ratification of the contract in question would justify any one in that belief.

The first shipment was made on or about the 27th day of January, 1911. On June 8, 1910, a circular was issued by the defendant railway company in which the appointment of the witness W. A. Cole, as *general agent* with offices at Minot, was announced. The witness Cole specifically testified that, prior to the shipment in question, his

principal business was that of soliciting freight. Prior to the shipment in question he had entered into negotiations with the plaintiff, and had induced him to lease elevators at Boscurvis, Paisley, and Newport, and had assured him that he could get a 22-cent rate from his elevators while the lake was open, and exerted himself in seeing that the boats on the lake were in condition to transport the same to the starting point of the railroad at Kenmare. Later on he took an active part in an attempted settlement of the claim. An agent whose prime function is to solicit freight; who goes by the title of general agent; who induces men to lease elevators in order that his company shall have freight; and who, though controlled by the tariffs of the road which are authorized by the Interstate Commerce Commission, nevertheless refers to these tariffs in soliciting trade,—has, in our opinion, after transportation by the usual agencies and by the connecting carrier contemplated has become impossible by the freezing of the waters of the lake, the ostensible authority to agree that, if the shipper will himself haul the grain across the lake on the ice by team, the railway company will pay him a reasonable amount for so doing.

A general agent of a railway company must be presumed to have some powers; and though the witness Cole, at one point in his testimony, states that his only function was to "make suggestions" and "to jolly," his prior transactions with the plaintiff and with the navigation company which plied upon the lake hardly bear out his word.

It is idle, indeed, to contend that the agent, W. A. Cole, did not have at least ostensible authority to make this contract. He was to all intents and purposes, and as far as the public was concerned, the general freight agent, the vice president, and the traffic manager of the road. There is no other way in which to construe his authority if any weight whatever is to be given to the terms of his appointment, and which were contained in a circular to the agents of the company, and which circular was as follows:

The Minneapolis, St. Paul, & Sault Ste. Marie Railway Company. Minneapolis, June 6, 1915. Effective June 10th. Mr. W. A. Cole is appointed general agent with office at Minot, N. D. T. E. Sands, General Freight Agent. Approved: W. L. Martin, Vice President and Traffic Manager.

It is also idle to say that his ostensible authority was only in the freight department, and that a contract for hauling grain belonged to the traffic, and not to the freight side of the road; for his appointment, as far at least as the public and the other agents and servants of the company were concerned, was that of a general agent, and was not merely signed by the general freight agent, but was approved by the vice president and traffic manager of the road. This circular was issued on June 8, 1910, while the first shipment of grain here under consideration was on the 27th day of January, 1911.

And not only was the contract within the ostensible, if not the actual, authority of the agent Cole, but it was subsequently ratified by the company itself, for it is undisputed that it collected from the consignees the through rate of 22 cents a hundred pounds from the elevators at Boscurvis, Paisley, and Newport when the rate from Kenmare was only 17 cents. If, indeed, no such contract for hauling was authorized, and the freight was considered as received at Kenmare, and not at the elevator points, why did the agent at Kenmare issue bills of lading from Boscurvis, Paisley, and Newport, and not from Kenmare, and why did the company collect the full 22-cent rate? And if they did not intend to assume the responsibility for the grain at the elevators, why did they issue, or, at any rate, authorize the issuance of a sole tariff sheet entitled, "Minneapolis, St. Paul, & Sault Ste. Marie Ry. Local and Proportional Tariff on Grain," in which they advertised a 22-cent rate from Boscurvis, Paisley, and Newport, but said nothing concerning the navigation company, save that the charge included cost of elevation from Mitchell Brothers' barges into cars at Smith, North Dakota? Not only, too, was there a ratification, but there was a prior custom and a prior course of dealing.

All of these facts were shown either by the defendant's own testimony and exhibits, or by the testimony of the plaintiff Knapp, which, as far as this appeal is concerned, must be taken as true.

This brings us to a consideration of the question as to whether the contract to pay the plaintiff 5 cents a bushel for hauling his grain from his elevators at Boscurvis, Paisley, and Newport to the railroad depot at Kenmare, was in violation of § 6 of the interstate commerce act, which forbids rebates and unlawful discriminations.

This really leads us to a determination of the question as to whether the railroad company was paying the plaintiff for services in hauling which they themselves had contracted and were authorized to contract to perform, or whether they were paying him for services and for hauling for which they themselves were not or could not be obligated.

If, indeed, the evidence disclosed or tended to disclose that the defendant railway company, though its line actually began at Kenmare, had the right to contract for the hauling of the grain and to be responsible therefor, not merely from Kenmare, but from the points across the lake at Boscurvis, Paisley, and Newport, even though the carriage across the lake would necessarily have to be actually done by an intermediary and independent carrier, and that the defendant, though not in fact the first carrier, assumed the duties and obligations of such, and was nevertheless the *initial* one, then there is no question that the charge or allowance of 5 cents a bushel for the hauling was justified, provided only that it was reasonable. The case, in short, comes within the exception to § 587 of vol. 34 of the Statutes at Large, chap. 3591, Comp. Stat. 1913, § 8597 (Fed. Stat. Anno. 1909 Supp. pp. 262, 263), which forbids rebates and unlawful discriminations. This exception is contained in 34 Stat. at L. 590, chap. 3591, Comp. Stat. 1913, § 8584, Fed. Stat. Anno. 1909 Supp. 266, and provides that "if the owner of property transported under this act directly or indirectly renders any service connected with such transportation, or furnishes any instrumentality used therein, the charge and allowance therefor shall be no more than is just and reasonable, and the Commission may, after hearing on a complaint, determine what is a reasonable charge as the maximum to be paid by the carrier or carriers for the services so rendered or for the use of the instrumentality so furnished, and fix the same by appropriate order, which order shall have the same force and effect and be enforced in like manner as the orders above provided for in this section."

Is there, then, evidence which should have gone to the jury on the question of whether the defendant agreed in the first place to assume the responsibility of an initial carrier toward the grain in the plaintiff's elevators and to keep those elevators empty, but on account of the freezing of the waters of the lake was unable to have the grain carried

on the boats of the navigation company as originally contemplated, and therefore, and in order to live up to its agreement, itself agreed to pay the plaintiff a reasonable rate for hauling the grain across the ice, reserving, however, the right to charge the regular tariff rate from the elevator points to the points of destination. Such a contract would have been perfectly lawful, and we think that there was evidence which tended to show that it had been made.

The plaintiff, Knapp, testified: "Mr. Cole solicited freight from me for the Soo road; in the fall of 1910 and prior to that time and after that time. He solicited freight from me on the Des Lacs lakes. The first talk was at Portal, I believe sometime in October, 1910. It was in regard to renting the elevators on the lake. He told me they were good points, and he asked me to go down and make a trial trip on the boat, look over the situation, and see what I thought about it. There was something said about shipping over the Soo road. He wanted me to go down and look over the situation. I did so. I had a conversation after that with him about points along there. I made the trial trip on the boat, and it didn't look very good to me, and I told him so. I told him that to me it didn't look as if they were very well equipped for hauling grain, but he assured me it was all right. I believe he said we would have no trouble in getting rid of all grain, that they had put \$1,000 into the conveyer. *He was representing the Soo road. He said the Soo road expended the money. He said the billing receipts would read from Boscurvis, Newport, and Paisley, and that I would get the receipts at Kenmare. No question about keeping the house empty so I could buy grain. The shipments were to be made over the Soo line. Mr. Cole, of the Soo road, did something in regard to fixing up the barges. He furnished some ties and some money to fix them up. I am sure the voucher was between forty and fifty dollars. The grain was not kept away from the elevators during the fall so that it would not get full. The elevators were pretty full in so far as grain was concerned when the lake froze up in the fall. I went to Mr. Cole. I went to him in Kenmare, and told him that the lake had frozen up, and I asked him how I could get the grain down. The only way left would be to wait until the ice froze hard enough to haul it down by team. We both said that, so he told me that*

if I would see to the hauling down he would see that I would be paid 5 cents a bushel for hauling. He said the Soo line would pay me 5 cents a bushel from the points of Paisley, Newport, and Boscurvis. I hauled the grain pursuant to this agreement. I paid the regular 22-cent rate on what I hauled. I hauled down 8,598 bushels at that time. I hauled them down after I had this agreement that I would receive 5 cents for hauling. I never got the money for hauling. I negotiated with Mr. Cole. In the summer of 1911, he said in the presence of Mr. Gilmore that the voucher was already made out, waiting for Mr. Palda's o. k. I did not pay the freight on the grain myself. This wheat was consigned to the Brown Grain Company and they paid the freight on it. I suppose it came out of the wheat in my settlement with the Brown Grain Company. This defendant hauled it at the rate of 22 cents a hundred."

In addition to this testimony there are in evidence bills of lading or receipts of the railway company bearing the heading: "Minneapolis, St. Paul, Sault Ste. Marie Railway Company," and signed: "M. St. P. & S. Ste. M. Ry. Co. by John Schmid, Agent," and *acknowledging receipt of the grain at the points of Paisley, Newport, and Boscurvis*, and containing the following receipt and shipping agreement: "Received, subject to the classifications and tariffs in effect on the date of issue of this shipping order *at Paisley (Newport or Boscurvis, as the case happened to be)* from D. C. Knapp, the property described below in apparent good order, except as noted (contents and conditions of contents of packages unknown) marked, consigned, and destined as indicated below, *which the Minneapolis, St. Paul, & Sault Ste. Marie Railway Company agrees to carry to its usual place of delivery at said destination,*" etc. The destinations given in these receipts are Kingston, Ont., Minneapolis, Minnesota, and Superior, Wisconsin. In addition to this, there is in the evidence a tariff sheet of the defendant railway company which bears its name and its name alone, and purports merely to be issued by it, which names a rate from the elevator points of Boscurvis, Paisley, and Newport of 22 cents, and which contains the following tariff: "Minnesota Division, continued; Newport, Paisley, or Patterson, N. D., or Boscurvis, Sask. to Minneapolis, St. Paul, Camden Place or Duluth, Minn., or Superior,

Wis., 22 cents." There is nothing whatever which refers to any navigation company except a note that the 22 cents "includes the cost of elevation from Mitchell Brothers' barges into the cars at Smiths, N. D." The same tariff contains the rate from Kenmare to the same terminals of Minneapolis, St. Paul, Duluth, etc., and gives that rate as 17 cents.

It is absurd to contend in the face of this record that there was no evidence to go to the jury and which tended to show, if it did not conclusively prove, that the railway company had contracted for the transportation of this grain from the elevator points, although it did not actually receive the grain on its cars until it reached Kenmare, and that the defendant was, to all intents and purposes, *the initial carrier* from the elevator points of Boscurvis, Paisley, and Newport. An initial carrier is, according to all authorities, the carrier first contracting with the shipper, and is not necessarily the one whose line constitutes the first link in the chain of transportation. See note in 31 L.R.A. (N.S.) 2; Savannah, F. & W. R. Co. v. Commercial Guano Co. 103 Ga. 590, 30 S. E. 555; Noyes v. Rutland & B. R. Co. 27 Vt. 110; Swift v. Pacific Mail S. S. Co. 106 N. Y. 206, 12 N. E. 583; Evansville & C. R. Co. v. Androscoggin Mills, 22 Wall. 594, 22 L. ed. 724. It is also absurd to contend that there is no evidence which tends to show that it agreed to pay the plaintiff the 5 cents per bushel as compensation for services for the hauling which it itself had agreed to perform.

It is also absurd to contend that the testimony of the plaintiff Knapp (and on the question of the directed verdict and alleged error in granting a new trial on account of such direction, the fact that much of this testimony is denied by the witness Cole is of no importance) does not show that a contract for paying for the hauling was made by the defendants' agent Cole, and that the reason for making the same was that the railway company, through its agent Cole, had induced the plaintiff to lease the elevators on the lake by holding out to it a 22-cent rate from such elevators to the Minnesota terminals, and by promising that it would see that the grain was properly transported across the lake, that it would see that the barges were kept in shape, and that it would bill the grain not from Kenmare, but from

Boscurvis, Paisley, and Newport, the points on the lake where the elevators were situated, and, above all, that it would see that proper shipping facilities should be furnished so that the elevators would be kept empty, and that the plaintiff would be enabled to buy grain with some assurance of safety. It shows that the company did not keep the elevators empty, and that the lake froze up when they were partly or wholly filled; that Cole then agreed, and as we may well infer, in order to meet his promise to keep the elevators empty, and which promise had induced the plaintiff to lease them and run the risks of his enterprise and of his purchases, that his company would pay the plaintiff a reasonable rate for hauling the grain on the ice; that is, for doing what the railway company, or, what is the same thing, had agreed that its agent, the navigation company, would do.

It is idle to say that the charge or compensation of 5 cents per bushel for hauling the grain on the ice was unreasonable. Not only was the burden of proof upon the defendant to show this fact, but the matter, in the absence, at any rate, of a determination by the Interstate Commerce Commission, was for the jury, and not for the court, to pass upon.

There can be no question that the defendant railway company had the power to enter into such a contract, and to assume the responsibility for the grain, even before it actually reached its own line. "It seems to be now well settled," says the supreme court of Vermont in the case of *Noyes v. Rutland & B. R. Co.* 27 Vt. 110, "that railroad companies, as common carriers, may make valid contracts to carry beyond the limits of their own road, either by land or water, and thus become liable for the acts and neglects of other carriers, in no sense under their control. *Muschamp v. Lancaster & P. Junction R. Co.* 8 Mees. & W. 421, 2 Eng. Ry. & C. Cas. 607, 5 Jur. N. S. 656; *Weed v. Saratoga & S. R. Co.* 19 Wend. 534; *Farmers' & M. Bank v. Champlain Transp. Co.* 23 Vt. 186, 56 Am. Dec. 68. It has never been questioned that carriers, whether natural or artificial persons, might by usage or contract bind themselves to deliver parcels and merchandise beyond the strict limits of their line in town and country; and in such case could only exonerate themselves by a personal delivery, 23 Vt. 186, and cases there cited. It seems to us, in principle, that these two proposi-

tions control the present case, for if a railroad company may contract for carrying merchandise and parcels beyond the limits of their line, *where the carriage is by porters, stages, by steamboats, or other watercraft, or by other railroads*, and this is to be justified upon the ground of usage and convenience, or common understanding and consent, the same rule of construction must equally extend to contracts to receive freight at points on the line before it reaches the company entering into the contract. It may be true, in one sense, that this is extending the duties and powers of the company beyond the strictest interpretation of the words of their charter. But the time is now past when, as between the company and strangers, any such literal interpretation of the charter is attempted to be adhered to. It is true, that such corporations, even as to strangers, are not allowed to assume obligations altogether beyond the general objects of their incorporation, as if they should assume to build steamboats or other railroads, perhaps. But within the general business of their creation, a very considerable latitude is allowed in contracts with strangers."

In the case of *Jordan v. Fall River R. Co.* 5 Cush. 69, 51 Am. Dec. 44, the defendants were common carriers of passengers and freight from Boston to Fall river; their trains being drawn from Boston to South Braintree, where the Fall River Railroad commences, by the engines of the Old Colony Railroad Corporation, under the sole direction of the conductors of the latter, and stopping to leave and take passengers on that road. The court held that "the proprietors of a railroad, who receive passengers and commence their carriage at the station of another road, are bound to have a servant there to take charge of baggage, until it is placed in their cars; and if it is the custom of the baggage master of the station, in the absence of such servant, to receive and take charge of baggage in his stead, the proprietors will be responsible for baggage so delivered to him."

In the case of *Phillips v. Earle*, 8 Pick. 182, "where a package was delivered to the agent of a stagecoach company, at the postoffice, where the stage was standing, and not at the office of the company, to be carried from Boston to Hartford, and was by the agent, when he received it, entered on the waybill, he having previously directed the person who had the care of the package to bring it to the postoffice, and the package

was lost before reaching Hartford, it was held that the owners of the coach were liable to the owner of the package for its value, the delivery at the postoffice being with the assent of their agent."

The case of *Swift v. Pacific Mail S. S. Co.* 106 N. Y. 206, 12 N. E. 583, is directly in point. The syllabus is as follows: "Defendant, the P. M. S. Co., was organized to navigate steamships on the Pacific and Atlantic Oceans (Laws of 1850, chap. 207). Its line connected at Panama on the Pacific and at Aspinwall on the Atlantic with the road of the defendant, the P. R. R. Co., which was operating under its charter a railroad between those places. In an action upon a joint contract made by the two corporations for the transportation of a quantity of oil from Panama to New York, held that defendants had power to make the contract and were jointly liable for a breach thereof."

It would certainly seem that if a steamship company could, by its bill of lading, contract for and make itself liable for the transportation of goods by railroad across the Isthmus of Panama, and from the western side thereof, when its boats only ran from the eastern side, that a railway company can contract and make itself responsible for the carriage of freight from a point across a lake a few miles distant from its terminus. See also *Savannah, F. & W. R. Co. v. Commercial Guano Co.* 103 Ga. 590, 30 S. E. 555; *Evansville & C. R. Co. v. Androscoggin Mills*, 22 Wall. 594, 604, 22 L. ed. 724, 727; *Deming v. Merchants' Cotton Press & Storage Co.* 90 Tenn. 306, 13 L.R.A. 518, 17 S. W. 89.

Nor can there be any question that the railway company had the right to agree to pay a reasonable amount for the services rendered in hauling the grain.

In the case of *Interstate Commerce Commission v. Diffenbaugh*, 222 U. S. 42, 56 L. ed. 83, 32 Sup. Ct. Rep. 22, the syllabus is as follows: "The interstate commerce act does not attempt to equalize fortune, opportunities, or abilities; it contemplates payment of reasonable compensation by carriers for services rendered, and instrumentalities furnished, by owners of property transported, the only power of the Commission being to determine the maximum of such compensation. Contracts made by various railroads for elevation expenses of grain at points of transshipment at rates not exceeding those fixed by the Commission as reasonable, held not to be illegal discriminations or rebates

when paid to owners of elevators on their own grain, although such owners performed services other than those paid for at the same time to their own advantage."

In the case of *United States v. Baltimore & O. R. Co.* 231 U. S. 274, 58 L. ed. 218, 34 Sup. Ct. Rep. 75, the syllabus is as follows: "The fact that the carrier leases a terminal from a shipper near that shipper's establishments does not, in the absence of any fraudulent intent, import a discrimination in favor of that shipper where the station is actually used for the benefit alike of all shippers in that neighborhood. A carrier may compensate a shipper for services rendered and instrumentalities furnished in connection with its own shipments; and if the amount is reasonable it is not a prohibited rebate or discrimination, even if the carrier does not allow other shippers to render and furnish similar services and instrumentalities and compensate them therefor." See also *Union P. R. Co. v. Updike Grain Co.* 222 U. S. 215, 56 L. ed. 171, 32 Sup. Ct. Rep. 39; *Louisville & N. R. Co. v. United States*, 197 Fed. 58; *W. H. Ferrell & Co. v. Great Northern R. Co.* 119 Minn. 302, 138 N. W. 284.

We have, too, in the case of *Mitchell Coal & Coke Co. v. Pennsylvania R. Co.* 230 U. S. 247, 57 L. ed. 1472, 33 Sup. Ct. Rep. 916, direct authority for such a contract as was made in the case at bar. In this case an action for damages was brought by a competing mine company for an alleged unlawful preference given to the Altoona, Glen White, Millwood, Latrobe, and Bolivar Mining Companies. The court, in its opinion, said: "The plaintiff insists that these facts demonstrate that the payments to the Altoona and other companies were not measured by the value of the track or locomotive, or by the cost of the service rendered, but were unreasonable in amount, were arbitrarily fixed, lowered, or withdrawn, and constituted a mere cover for rebating. On the other hand, the defendant insisted that, *though bound to haul the cars to and from the mines, it could not economically do the work on account of the physical conditions at the Altoona, Millwood, and Glen White mines, and that it therefore employed those companies to perform that transportation service, paying them therefor an allowance which is prima facie reasonable, and must be so treated by the courts until the Commission has determined that it was excessive or constituted an unjust*

discrimination. . . . But although the statute then in force was not construed to require the publication of allowances, their payment was lawful only when supported by a consideration. To pay shippers for doing their own work would have been a mere gratuity, and if here the carrier was not bound to haul from the mine, it had no more right to pay these companies for bringing their coal over the spur track to the junction than it would have had to pay a merchant for hauling his goods in a wagon to the railroad depot. The plaintiff insists that such is the case here, and that, as the tariff named the rate from the station, it could not lawfully include the haul from the mine, and consequently paying the shippers for doing their own hauling was a mere rebate. Such undoubtedly it would have been if naming the rate from the station to destination meant that the haul had to begin at the depot building. But neither the statute nor the tariff defines what are station limits, nor do they fix the exact point from which the transportation must begin, nor the territory within which the delivery must be made. These limits necessarily vary with the size of the communities, the extent of the yards, *the practice of the carrier*, and the bounds within which it uniformly receives and delivers freight. This is particularly true in a case like the present, where the Clearfield district was treated as a single shipping point, and where the rate, though named and published as from the station, was universally applied from the mines of the Mitchell company as well as the other companies named in the declaration and all others located in the Clearfield district. Inasmuch as this rate included the haul, the railroad was bound to transport the coal from the mouth of the mines, and could use its own engines for that purpose, or it could employ the coal companies to render that service, paying them proper compensation therefor. In case any question arose as to the reasonableness of the practice, the limits within which the station rates should apply, or the reasonableness of the allowance paid those shippers who supplied motive power, the Commission alone could act. For the courts are no more authorized to determine the reasonableness of an allowance for a haul over a spur track, between mine and station, than they are to pass upon the reasonableness of a rate for a haul, over a trunk line, between station and station. What is or was a proper allowance is not a matter of law until after it has been fixed by the rate regulating body.

The courts can then apply that law, and, measuring what has been charged by what the Commission declares should have been charged, can award damages to the extent of the injuries occasioned by the payment of the allowance found to have been unreasonable and unlawful. That station rates may be applied from mill or mine reached by spur tracks is recognized by the ruling of the Commission in the Tap Line Case, 23 Inters. Com. Rep. 277, where, in dealing with the practice of paying an allowance for hauling lumber from sawmills, the Commission said: 'In all cases it is apparently the practice of the trunk lines, where no allowance is made, to set the empty car at the mill, and to receive the loaded car at the same point. Indeed, they do this in many cases even when an allowance is made to the tap line. But whenever this service is performed by the trunk line, it is included in the lumber rate, and is done without additional charge. In some instances the switch or spur track connecting the mill with the trunk line is as much as 3 miles long. In other words, by their common practice the public carriers *interpret the lumber rate as applying from mills in this territory apparently as far as 3 miles from their own lines.* So far as the manufactured lumber is concerned, it may therefore be said that where a mill has a physical connection with a trunk line, and is not more than 3 miles distant, *the transportation offered by the trunk line commences at the mill.* If, therefore, a lumber company, having a mill within that distance of a trunk line, undertakes, by arrangement with the trunk line, to use its own power to set the empty car at the mill, and to deliver it when loaded to the trunk line, it is doing for itself what the trunk line, under its tariffs, offers to do under the rate. In such a case the lumber company may therefore fairly be said to furnish a facility of transportation for which it may reasonably be compensated under § 15, whether its tap line is incorporated or unincorporated. In other words, the lumber company thus does for itself what the trunk line does with its own power at other mills without additional charge, and what it must therefore do for the particular lumber company without additional charge. Under such circumstances we think the lumber company, under § 15, may have reasonable compensation when it relieves the trunk line of the duty. But an allowance under such circumstances is lawful only when the trunk line prefers, for reasons of its own and without dis-

crimination, to have the lumber company perform the service. It is not lawful when the lumber company refuses to permit the trunk line to do the work.' Ibid. In view of this ruling it is apparent that lateral allowances might have been lawfully paid. They became unlawful only when unreasonable. Whether they were so or not was a rate-making question as to which parties were directly at issue, and which the courts had no jurisdiction to determine so far as it concerned the allowances to the Altoona, Millwood, and Glen White mines. Having no jurisdiction, the parties could not by consent give it to the court, to the judge, nor to the referee. And if, as claimed, the stipulation to submit the case to the referee estops the defendant from insisting on the plea of the statute of limitations, that, with all other relevant issues, can then be determined, if the Commission decides that the allowance was unlawful, and the carrier has no other defense."

"All special contracts or traffic arrangements between carrier and shipper," says Mr. Hutchinson in § 538 of the 3d ed. of his work on Carriers, "are not forbidden or condemned, but only such as operate unfairly and evidence undue favoritism toward one, or deprive another of his just rights. So long, therefore, as there is no unjust discrimination and no stipulation in the contract forbidding the carrier extending similar rates to all other shippers similarly situated, there is no express provision of law and no sound reason arising out of public policy which prohibits a carrier entering into a fair and equitable milling in transit arrangement by which the carrier contracts to credit on the freight charges on manufactured goods any freight on raw material shipped to the factory. Nor is a railroad company guilty of unlawful discrimination by receiving cotton from one shipper at a particular place of shipment, shipping it to another point, and having it compressed there at the company's expense, and then reshipped to its place of destination for a rate equal to its published through rate from the place of shipment to such places of destination, where such an arrangement is in compliance with a recognized custom, of which all other shippers can avail themselves, and where it does not appear that a party complaining desires to ship any cotton from that particular place of shipment to the points of destination, or that he is compelled to pay a higher rate under similar

circumstances." *Thompson v. San Antonio & A. P. R. Co.* 11 Tex. Civ. App. 145, 32 S. W. 417.

These cases are conclusive of the one at bar. There can be no question that the defendant railway company was in the habit of assuming the responsibility for the freight at the elevators of the plaintiff upon the lake, and which, though beyond the line of the railroad itself, were connected therewith by a line of boats, and that the railway company gave to the plaintiff a through rate from the elevators to the points of destination. The elevators, therefore, were in what the case just cited would term the "yard limits" of the railway company. The railway company had agreed to transport or to be responsible for the transportation of the goods from the elevators. The freezing of the waters of the lake had made it impossible to operate, or to see that others would operate, the boats, and the company thereupon agreed with the plaintiff that if he would himself haul the wheat upon the ice it would pay him for such hauling. The case is in no way different from the hauling of ore from the mouth of a mine on a spur track by the mine owner to the railway station, and for which hauling the railway company has agreed to pay. It is not necessary for us to determine whether the company can now question the reasonableness of this charge, or whether it is not a matter for the Interstate Commerce Commission to determine. All we have to say is that there is no evidence which shows it to be unreasonable, and that there is no finding of the Interstate Commerce Commission to that effect.

All that the company could charge from Kenmare was 17 cents. For some reason or other best known to itself, it charged him the rate of 22 cents, which would have been the rate from his elevators, and which would be the correct rate provided that it had agreed to be responsible for the grain from such elevators, or had actually carried it or had caused it to be carried from them. It, however, agreed that if the plaintiff would himself haul the grain from his elevators to Kenmare, it would allow him the 5 cents a bushel for hauling.

We must not assume in this case a criminal intent on the part of the agent Cole or of the railway company, but if they intended to charge the 22 cents from Kenmare, their act was certainly criminal. The plaintiff relies in this case upon the contract. The defendant agreed

to pay him 5 cents a bushel for hauling the grain. If such contract had not been made, he certainly could have brought an action against the company on the ground of an overcharge and for money had and received to the amount of 5 cents per hundred pounds. If such an action had been brought, the company would hardly have cared to defend on the ground that the 22-cent charge was illegal and the contract a nullity. Would anyone contend that if the general freight soliciting agent of an express company were to go to a shipper, and show him a fixed schedule of rates, and tell him that his company was short of teams, and that if he would haul the goods to the depot it would pay him for such hauling and that he could deduct the amount from their charges, that such a contract would be illegal, provided that the amount agreed to be paid for the hauling was reasonable? Such contracts, indeed, appear to be expressly authorized by the interstate commerce act itself, which, among other things, provides that "if the owner of property transported under this act directly or indirectly renders any service connected with such transportation, or furnishes any instrumentality used therein, the charge and allowance therefor shall be no more than is just and reasonable, and the Commission may, after hearing on a complaint, determine what is a reasonable charge as the maximum to be paid by the carrier or carriers for the service so rendered or for the use of the instrumentality so furnished, and fix the same by appropriate order, which order shall have the same force and effect and be enforced in like manner as the orders above provided for in this section." See Fed. Stat. Anno. 1909 Supp. 266; 34 Stat. at L. 590, chap. 3591, Comp. Stat. 1913, § 8583.

We realize, of course, that an express company assumes the obligation of transporting the goods to and from homes or places of business of the shippers and consignees, and that express company cases are not always in point nor apply to railway company contracts. As we have before seen, however, a railway company may contract to be liable from a point beyond its lines. It may contract that it itself shall be responsible for the carriage upon an independent line of carriers which connects it with the shipper. It may, in short, make the independent line its agent. The evidence before us shows to us quite conclusively that this was the fact in the case at bar.

The defendant calls attention to another so-called joint tariff on

grain, and, though on his oral argument he contended that this tariff was a mistake and as a matter of fact could not have been promulgated, contends in his printed brief that such document superseded the sole tariff sheet which was issued by the defendant company on the 23d day of December, 1909, and that this later tariff provided for a payment of 5 cents a *bushel* to the navigation company and the balance to the defendant railway company. Even if this be true, however, we do not see how it affects the case before us. Even if it was intended as a tariff for the public generally, and not merely as a memorandum of an agreement between the railway company and the navigation company, it is not at all inconsistent with the through rate from the elevator points, and did not preclude the railway company from making such, provided there was no discrimination as to other shippers. So, too, at the time of the shipment in question, the boats were not running and there was, to all intents and purposes, no navigation company at all. The railroad, therefore, had, if it desired to obtain the grain at all and to live up to its prior promise to the plaintiff on the strength of which he had leased the elevators, namely, to see that he had a 22-cent rate from his elevators and that such elevators should be kept empty, no other option but to return to its tariff of December 23, 1909, or to make some new agreement. All this tariff tends to show, indeed, was that the allowance of 5 cents per bushel as opposed to 5 cents a hundred pounds was a reasonable compensation, for this is exactly the compensation which the additional tariff allows to the first carrier, the navigation company.

In addition to this, there is no question that the trial judge was correct in the statement which he made in granting the motion for a new trial, and as one of the reasons therefor, that the defense of illegality or violation of public policy must be specially pleaded if the court does not refuse to entertain the case. *Illstad v. Anderson*, 2 N. D. 167, 49 N. W. 659; *Atchison & N. R. Co. v. Miller*, 16 Neb. 661, 21 N. W. 451; *Cardoze v. Swift*, 113 Mass. 250.

The order granting a new trial is affirmed.

Goss, J. (concurring). In my opinion the cross-examination was unduly curtailed, as held in the main opinion, and there was evidence sufficient to take the case to the jury for a finding, upon the authority

of Cole, to bind the company by the alleged agreement plaintiff claims to have entered into with defendant, through its agent.

There seems to me to be no question involved of an unlawful preference. Concededly the grain was billed as upon the legal transportation over a connecting carrier from Boscurvis, Canada, to Duluth, and a rate of 22 cents per hundred pounds collected. This rate is in evidence, and had previously been filed with and approved by the Interstate Commerce Commission, thereby validating not only the rate, but the route and the charge made upon that basis. The rate charged and collected was legal and upon a legal contract of carriage. Hence it was within the power of the carrier to allow any owner of property transported who "directly or indirectly renders any service connected with such transportation or furnishes any instrumentality used therein, the charge and allowance therefor (that) shall be no more than is just and reasonable." The word in parenthesis the writer has inserted that the language of the statute may be used. But was this hauling on the ice, doing the transporting originally done by the connecting water carrier, a service to defendant carrier "connected with such transportation," or "any instrumentality used therein" furnished by the shipper. The company has so treated it in billing the shipment and collecting the combined rate therefor. If the carrier could legally thus bill the freight as from the lake point to Duluth, and thereby treat its transportation by plaintiff from the lake points to Smith's Landing as an independent carrier, it could make such contract and treat such transportation as service rendered to it in the transportation of goods from Boscurvis to Duluth. If it could route and charge 22 cents per hundred weight as upon a legal contract of carriage by it from Boscurvis to Duluth under these circumstances where the plaintiff delivered the goods at a point from which the transportation was but 17 cents to Duluth, it certainly could make this contract and agree that the plaintiff by what he had done had rendered "service connected with such transportation," as service to the carrier. If the defendant can legally charge and collect the 22-cent rate as for a contract of carriage, it can agree that a service has been rendered to it by what has been done by plaintiff along that very route. If in law the grain was delivered at Smith's Landing, instead of at Boscurvis, there was no authority for the collection of more than 17 cents per hundred weight. If

on the basis of there being an established and approved 22-cent rate between said points, the company could agree that they have carried the grain between said points, and thereby recognize, under circumstances peculiar to this case, plaintiff to be its connecting carrier for a portion of the way, it could, as plaintiff claims it has, agree also that, in addition to its being such connecting transporting carrier for that portion of the route, plaintiff has also in addition thereto rendered it actual and unusual service, for which it should pay, and for which by contract it has agreed to pay, an added two thirds of the freight rate aggregating 5 cents a bushel all told. In the absence of pleading and proof that the amount agreed to be paid for such service is unjust and unreasonable, it must be presumed that the contract is a reasonable one, and the contract covering both rate and service just and enforceable.

In any event, under the facts peculiar to this case there is a sufficient basis, so that the charge cannot be said to have been agreed to be paid without color of right to contract therefor, and the question then must be one of fact. *State ex rel. Railroad Commission v. Adams Exp. Co.* 171 Ind. 138, 19 L.R.A.(N.S.) 93, 85 N. E. 337, 966; *Gamble-Robinson Commission Co. v. Chicago & N. W. R. Co.* 94 C. C. A. 217, and note thereto citing much authority (21 L.R.A.(N.S.) 982, 168 Fed. 161, 16 Ann. Cas. 613). It cannot be held as a matter of law that there was any intent either to give or receive a rebate or commit illegal acts. Without any pleading raising it, and without any proof of intent upon that issue, it should not be held that the parties have contracted for a preference rate simply because the carrier contracted to pay plaintiff 5 cents per bushel out of the rate of 22 cents per hundred collected upon the basis of the established rate from Boscurvis to Duluth.

The trial court was right in granting a new trial.

CHRISTIANSON, J. (concurring specially). While I concur in an affirmance of the order granting a new trial, it seems to me that some of the questions discussed by my brethren Bruce and Goss do not require consideration on this appeal, and I do not care to express any opinion thereon.

It is undisputed that the Des Lacs Navigation Company during the fall of 1910 owned and operated a barge line from certain points on

Des Laes lake to Smith's (Landing), from which latter point the defendant had constructed a spur track connecting with its main line at Kenmare, North Dakota. It is also undisputed that the published tariffs gave a rate of 22 cents per hundred from the lake points, and 17 cents per hundred from Smith's and Kenmare, to Minneapolis, Duluth, or Superior respectively. It is also undisputed that the Des Laes Navigation Company did not succeed in carrying all the grain in the elevators at the lake points. Plaintiff testified that, after the lake froze over, defendant's general agent entered into an agreement with him whereby plaintiff agreed to haul the grain remaining in the elevators on sleighs over the route formerly used by the navigation company, for which hauling plaintiff was to receive 5 cents per bushel. Defendant's general agent admits some negotiations with plaintiff with respect to transportation of the grain over the ice, but denies that he agreed to pay 5 cents per bushel, and says that in such conversation he "referred to the tariff schedules." It is conceded that plaintiff hauled in all 8,836 bushels, 40 pounds, of wheat, and that defendant waybilled such shipments from the lake points, and at the destination collected freight charges from such lake points. At the time the agreement was made, the Des Laes Navigation Company could no longer operate. It was to defendant's interest to obtain freight shipments, and it was only natural to arrange, if possible, with or for some other carrier to perform the service which the former connecting carrier no longer could perform. An agency may be created and authority conferred upon an agent not only by a precedent authorization, but also by subsequent ratification. (Comp. Laws, § 6328.) And ratification of part of an indivisible transaction is a ratification of the whole. (Comp. Laws, § 6332.) The arrangement to haul the grain was made by defendant's general agent. Plaintiff performed the service agreed upon. Defendant accepted the benefits of the agreement. It received and billed the shipments and collected the joint through freight charges thus earned, and has retained the whole thereof. Even defendant's counsel admit that the railroad company has collected and retained in its possession moneys for freight charges on the shipments in question in excess of those which defendant has earned at the rate of 5 cents per cwt., or about \$247.40 in all, and that these moneys belong to the plaintiff. These charges were collected between January 1, 1911, and March 1,

1911. The present action was not commenced until October, 1912, but the excess charges were never returned or offered to plaintiff. Defendant at no time repudiated, in whole or in part, the authority of its general agent to make the traffic arrangement with plaintiff to carry the shipments left by its former connecting carrier, but retained all the benefits received from such arrangement, including the excess freight charges. Under these facts I do not believe that it can be said as a matter of law that the general agent had no authority to make such arrangement, and that the same is not binding upon the defendant.

Did the agreement violate the Federal interstate commerce law by allowing plaintiff a rebate? It seems to me that under the evidence in this case the question of rebating does not arise. The defendant's general agent was called as a witness and testified upon the trial, and, as part of his examination, defendant's counsel offered in evidence a joint tariff schedule showing the distribution of the freight charges between the barge line and the defendant railway company on shipments of grain, flax, and millet seed from the lake points to Minneapolis, Duluth, or Superior, and such joint tariff schedule recites *that the barge line is to receive 5 cents per bushel* and the Soo line the balance. The joint tariff schedule so offered in evidence is signed by T. E. Sands, general freight agent of the defendant railway company, and bears the notation that it is "issued by J. H. Rees, chief of tariff bureau." The division of rates between the barge line and the defendant railway company thus established was not contradicted by any evidence offered upon the trial. But defendant's counsel argues that the schedule is erroneous, and that the words, "5 cents per bushel," should read "5 cents per 100." Defendant's counsel contends that this mistake is conclusively established by the fact that the other schedules show that a rate of 17 cents per hundred was charged from Kenmare, and 22 cents per hundred from the lake points to Minneapolis, Duluth, or Superior, respectively.

The facts established by no means justify the conclusion contended for by defendant's counsel. No evidence was offered to show the local rate from the lake points to Smith's or Kenmare. The only schedules offered in evidence show the rate from Kenmare and the lake points to Minneapolis, Duluth, or Superior respectively, and the division of the joint rate from the lake points to the terminals mentioned between the

barge line and the defendant railway company. The published through rates are presumptively authorized by, and based upon, an agreement between the two carriers. (Judson, *Interstate Commerce*, 2d ed. § 315.) Except as limited by the provisions of the interstate commerce act, the different carriers are free to adopt or refuse to adopt joint through tariff rates, and have the right to agree to a joint through tariff on terms mutually satisfactory. (*Southern P. Co. v. Interstate Commerce Commission*, 200 U. S. 536, 50 L. ed. 585, 26 Sup. Ct. Rep. 330.) And the propriety and reasonableness of such rates (and in case of disagreement between the carriers), the proper division thereof as well, are matters to be determined in the first instance by the Interstate Commerce Commission. "Through rates and through billing are matters of agreement among carriers engaged in interstate commerce, excepting where established by order of the [Interstate Commerce] Commission. . . . Through rates are not required to be made on a mileage basis, nor local rates corresponding with the division of a joint through rate over the same line." Judson, *Interstate Commerce*, 2d ed. § 180. In the recent case of *Empire Coke Co. v. Buffalo & S. R. Co.* 31 Inters. Com. Rep. 573, 579, it was said: "The Commission has repeatedly held that divisions are matters of agreement among participating carriers, and, while they may be considered as evidence, they are not regarded as conclusive, and ordinarily afford but little basis upon which to determine the reasonableness of joint rates. As we stated in *Florida Mercantile Agency v. Pennsylvania R. Co.* 21 Inters. Com. Rep. 85, 87: What the public is primarily interested in is the charge for the service rendered, irrespective of the divisions of the rate, and if the rate itself is reasonable and just the fact that it is unequally divided between the participating lines is not a basis for reduction. *There may be many reasons why a particular carrier would be willing to accept a very small proportion of a joint rate in order to secure business*, and it is within its rights in bargaining with its connections for tonnage so long as it does not undertake to haul one class of traffic at rates so low as to thereby burden other traffic." Where a joint rate has been established by order of the Interstate Commerce Commission, and the connecting carriers are unable to agree upon division of the through rates, the Interstate Commerce Commission has held that "such division should be made with respect to earnings of the lines to and from

points of interchange," and that "in establishing equitable divisions it is necessary to have regard for all the surrounding circumstances and conditions." (Rates on Lumber & Other Forest Products, 31 Inters. Com. Rep. 673, 676.)

The schedule in question was offered in evidence by the defendant. The trial court based its order granting a new trial largely thereon. The correctness of the schedule was never challenged by anyone in the court below. There seems to be no good reason why the defendant railway company and the barge line might not lawfully have agreed upon a division of the joint rate on the basis shown therein, and certainly an appellate court cannot accept counsel's argument as conclusive evidence of the incorrectness of a tariff schedule received in evidence, and considered to be correct in the proceedings had in the court below.

The main object of the agreement between the plaintiff and defendant's general agent was to substitute plaintiff as a carrier in lieu of the navigation company. The purpose of this agreement did not contravene any provision of law or public policy. The only part of such agreement that could possibly be violative of law or public policy is the amount of compensation to be paid. There is no contention that any illegal intent existed on the part of either party either to give or receive a rebate. They were dealing with a condition brought about by the failure or inability of the navigation company to carry the grain. The prime object of the arrangement between plaintiff and defendant's general agent was lawful, and any actual intent to effect an unlawful purpose or object is negated by the testimony and every fact and circumstance in the case. It is true that in order to constitute a violation of the statute a specific criminal intent need not be shown to exist; that moral turpitude or wicked intent is not essential to a conviction; and that the only criminal intent requisite to the offense created by the statute is the purpose to do an act in violation thereof. (See *Armour Packing Co. v. United States*, 209 U. S. 56, 52 L. ed. 681, 28 Sup. Ct. Rep. 428.) But it is equally true that a contract for a rebate in violation of the interstate commerce act does not invalidate the contract of affreightment, but such contract remains binding upon the carrier. *Merchants' Cotton Press & Storage Co. v. Insurance Co. of N. A.* 151 U. S. 368, 38 L. ed. 195, 4 Inters. Com. Rep. 499, 14 Sup. Ct. Rep. 367. And it has also been held that it is proper to show

that there was no intent to violate the act, *i. e.*, that there was no intent to do what is prohibited by the act. (Atchison, T. & S. F. R. Co. v. United States, 95 C. C. A. 446, 170 Fed. 250.)

Defendant's counsel concedes that if the division sheet offered in evidence by himself is correct, that then no illegal preference or rebate was granted to the plaintiff, as plaintiff would then merely be receiving the same compensation which the former carrier, the navigation company, had received under the joint tariff arrangement for carrying grain over the same route. Therefore if the division sheet is correct this disposes of the question of preference. But even though the division sheet is erroneous, and the navigation company as a matter of fact was to receive only 5 cents per hundred weight instead of 5 cents per bushel, the facts would still remain that the defendant operated under the traffic arrangement with plaintiff, and billed shipments as originating at the lake points, and concededly collected freight charges from the lake points to the points of destination, and in any event has in its possession at least \$247 of moneys which in good conscience belong to the plaintiff. Having participated in the traffic arrangement and come into possession not only of the profits belonging to it under such agreement, but the profits belonging to plaintiff as well, defendant should not be permitted to interpose the objection that the transaction or agreement which produced the fund was in violation of law. *McBlair v. Gibbes*, 17 How. 232, 15 L. ed. 132; *Brooks v. Martin*, 2 Wall. 70, 17 L. ed. 732; 9 Cyc. 557 et seq. Plaintiff should in any event be permitted to recover the amount which defendant charged and received from the shipper as freight charges from the lake points to Smith's. The fact that plaintiff happens to be the owner of the grain transported does not necessarily enter into the transaction. Under the evidence in this case he, under an arrangement with defendant's general agent and at his request, did perform the service which a former connecting carrier was no longer able to perform, and as a result of such service the plaintiff has collected the same freight charges which it would have collected if the former connecting carrier had performed such service. This being so, no good reason exists why plaintiff should not recover the same compensation which the former connecting carrier would have received therefor. And under the evidence in this case that is all which he seeks to recover. Whether the defendant could

lawfully enter into a contract to pay the plaintiff a larger sum than that paid to the former carrier, and whether such agreement, if made, would constitute an unlawful preference in the nature of a rebate, is a matter upon which I express no opinion, as the record in this case neither justifies nor requires a decision upon that point.

FISK, Ch. J. (dissenting). I respectfully dissent from the conclusion announced by my associates. My reasons for so doing are briefly as follows:

While the evidence discloses that the witness Cole, through whom plaintiff claimed his contract was made, was a general agent of defendant in his traffic department, it affirmatively appears that he had no authority whatever in the operating department of such road, and therefore was vested with no authority to enter into contracts such as plaintiff alleged was entered into. Furthermore, the published tariff rate which had been fixed at 22 cents per hundred as the joint tariff from the lake points to the Minnesota terminals, or 5 cents per hundred from such lake points to Kenmare, and 17 cents per hundred from the latter point to such terminals, could not be deviated from in this way even if Cole had general authority to enter into contracts. Plaintiff's contention is that he was hired to haul his own grain from the lake points to Kenmare, and deliver it to defendant, at the rate of 5 cents per bushel. If so, then it seems that defendant must, in effect, have agreed to an illegal rebate from the tariff rate of 17 cents per hundred from Kenmare aforesaid. As a matter of fact, defendant did not operate as a common carrier between the lake points and Kenmare at all, as its joint schedule of rates discloses, and it is erroneous to say that plaintiff in hauling his grain performed a service for the railway company for which it had a right to pay a reasonable price. Such joint rate is on the basis of 5 cents per hundred pounds for the navigation company and 17 cents per hundred for the defendant company.

Defendant's counsel at the oral argument conceded that in a proper action plaintiff would be entitled to recover from defendant on the basis of 5 cents per hundred, which is the sum collected by it in excess of its proportion of the joint rate. As I view it, this is the extent of defendant's liability.

WILLIAM WESTLAKE et al. v. B. J. ANDERSON et al.

(156 N. W. 925.)

Diversified farming — county — petition for levy — revenues to promote — county commissioners — refusal to make levy — mandamus — writ — order — appeal — discretion withheld — statute mandatory.

1. Upon petition therefor of more than 25 per cent of the taxpayers of Ward county, filed in 1913, a levy was made in 1913 and 1914, under § 2263, Comp. Laws 1913, to promote diversified farming. In 1915 the board of county commissioners refused to levy a tax for such purposes upon the 1913 petition as a basis, claiming a further levy to be within the discretion of said board. Mandamus was brought, and from a writ directing a levy an appeal has been taken by the board.

Held: No discretion was vested in said board. Upon a valid petition filed "the board of county commissioners *shall annually* make an appropriation and levy a tax upon all taxable property of the county for the purpose of promoting diversified farming," quoting from the act, § 2263. Under this explicit direction an annual levy is required to be made, and the writ was properly issued.

Annual levy — for diversified farming — relief from — legislature — statute — placing command of — discretion.

2. The legislature alone has power, by future legislation, to relieve from such future annual levy directed. Because no provision for its discontinuance is made, it cannot be presumed that any discretion to discontinue the levy was vested in the board, contrary to the plain command of the statute that the board "shall annually make" a levy for said purposes.

Legislative power — delegation of — county board — acts of — ministerial.

3. Said act constitutes no delegation of legislative power. The board acts only ministerially, and its only duty is to obey the statute.

Opinion filed February 11, 1916. Rehearing denied March 6, 1916.

Appeal from the District Court of Ward County, *Leighton, J.*
Affirmed.

R. A. Nestos, State's Attorney, and *O. B. Herigstad*, Assistant State's Attorney, for appellants.

If § 2263 of the 1913 Compiled Laws is construed to mean that a petition once filed makes it the duty of the county commissioners to levy such tax each year thereafter, then the law is unconstitutional, in that

it is a delegation of power to a minority of the voters of a county. N. D. Const. art. 2.

Thompson & Wooldedge, for respondents.

This law is mandatory. No discretion is vested in the board of county commissioners. When a valid petition is filed, it becomes their duty to act at once and make the levy. Comp. Laws 1913, § 2263; Atty. Gen. v. Eau Claire, 37 Wis. 400; 37 Cyc. 725; State ex rel. Goodwin v. Nelson County, 1 N. D. 88, 8 L.R.A. 283, 26 Am. St. Rep. 609, 45 N. W. 33; Brodhead v. Milwaukee, 19 Wis. 658, 88 Am. Dec. 711; Soliah v. Cormack, 17 N. D. 393, 117 N. W. 125; 28 Cyc. 1663; Bauman v. Ross, 167 U. S. 548, 42 L. ed. 270, 17 Sup. Ct. Rep. 966.

The word "annually" means yearly, or once in each year. Continental Nat. Bank v. Buford, 107 Fed. 188; People v. Brenham, 3 Cal. 477; State ex rel. Curtis v. McCullough, 3 Nev. 202; Sharpe v. Lee, 14 S. C. 341; Westfield v. Westfield, 19 S. C. 85; Union Iron Co. v. Pierce, 4 Biss. 327, 12 Mor. Min. Rep. 19, Fed. Cas. No. 14,367; Juker v. Com. 20 Pa. 484; McMaster v. New York L. Ins. Co. 40 C. C. A. 119, 99 Fed. 856.

Goss, J. In 1913 a petition signed by more than 25 per cent of the taxpayers of Ward county was presented to the board of county commissioners, asking that a tax be levied that year "and annually thereafter for the purpose of promoting diversified farming and agricultural developments through the employment of a person or persons to carry on scientific agricultural work within said Ward county," pursuant to § 2263, Comp. Laws 1913. The tax was levied for 1913 and 1914. In 1915 the board refused to continue said levy. Thereupon mandamus was brought to compel it to do so, and upon hearing the peremptory writ directing said levy was issued. An appeal has been taken therefrom.

The question is primarily one of construction of statute. Omitting immaterial parts the statute reads: "The board of county commissioners . . . may in its discretion, or, upon petition of 25 per cent of the taxpayers of said county, *shall, annually* make an appropriation and levy a tax upon all the taxable property of the county for the purpose of promoting diversified farming." In the absence of a peti-

tion the board of county commissioners, "in its discretion, may" make an appropriation and levy a tax for this purpose. In the absence of a petition, then, there would be no question but what they could discontinue or refuse to make the levy in the discretion of the board. But "upon a petition of 25 per cent of the taxpayers of said county [the board] *shall annually* make an appropriation and levy a tax" for said purposes. Under the plain direction of the statute all discretion in the board disappears upon such a petition being filed. The board then becomes but the ministerial instrumentality to carry out the prayer of the petition, and "*shall annually* make an appropriation and levy a tax" for such purposes. But appellants contend they have annually levied a tax at two prior years, and that the board have a right to discontinue the levy; otherwise, the levy may be virtually a perpetual one to be made every year until the law is changed. It was the intent of the legislature, as expressed in the act, that the board shall yearly, *i. e.*, annually, make the levy that the promotion of scientific agricultural work once begun shall not be interrupted at the pleasure of the board, but instead shall be continuous until such time as the legislature shall amend the statute.

In the very recent decision of *Comer v. State*, — Ind. —, 110 N. E. 984, a similar petition and for the same purpose was presented to the board empowered to make such an appropriation. That opinion is quoted: "At the regular session of said council in September, 1914, it failed, neglected, and refused to appropriate the sum of \$1,500 out of the funds of Jasper county to be used for the payment of a county agent for said county for the year 1915." A petition of taxpayers for such an appropriation was filed in 1913 and an appropriation for that year made, but the board refused to continue the same in 1914 without a new petition. Thus it will be seen that the facts are parallel. The court states: "The presented question requires for its solution a construction of part of § 12 of the vocational education law of 1913. . . . That section provides that, on the filing of a proper petition 'together with a deposit of \$500 to be used in defraying expenses of such agent the county board of education shall file said petition within thirty days of its receipt with the county council, which body shall upon receipt of such petition appropriate annually the sum of \$1,500 to be used in paying the salary and other expenses of said county agent'

"The validity of § 12 as a whole and the imperative character of the duty which it places on county councils generally were questions considered by this court in the case of *State ex rel. Simpson v. Meeker*, 182 Ind. 240, 105 N. E. 906, and we see no reason to depart from our conclusions reached in that case. This appeal, however, presents the further question as to whether § 12 *having once become operative in a county, it is necessary annually to refile the petition therein provided for in order to continue its operation.* We do not so construe the law. The complaint shows affirmatively that a proper petition was filed with the appellant council in the year 1913 and that the requested appropriation was made. It thereafter continued as the duty of said council to renew said appropriation *annually and without awaiting the receipt of a further petition.* . . . Agricultural education since the adoption of the law of 1913 has become a regular and important department in the school system of the state, and its effective administration should not be handicapped by a strict construction of the provisions of that law." The levy was directed. The facts and the statute are so closely parallel that *Comer v. State* is authority on all questions presented, even to the constitutionality of the act as passed upon in *State ex rel. Simpson v. Meeker*, referred to.

Appellants contend that the legislature did not intend it to be so construed, for the reason that they made no provisions for the discontinuance of the levy. This is the strongest reason why it intended the levy to be continuous,—that the course of work to which the tax is to be applied should be uninterrupted.

It is argued that it should not be possible for one fourth of the taxpayers, "by the mere filing of a petition, to create a tax that is binding on all the voters of that county forever after until some law is passed repealing the same." When it comes to a question of sanction or acquiescence by a percentage of voters in tax laws, it is safe to assume that few of our permanent tax levies are initiated under the sanction of as large a percentage as this of the taxpayers affected. It can well be said that had the legislature intended a yearly appropriation at the discretion of the commissioners, they would have said so, instead of using mandatory language to the contrary, and they would hardly have required a petition of 25 per cent of the total taxpayers of the county, or nearly 1,200 in this county, to institute this levy. To procure such

a petition necessitates an expenditure of time and money. The act in effect provides that once this is done the appropriation shall continue under present law indefinitely, the board having no discretion in the matter.

It is contended that the vesting of power in the commissioners to levy the tax upon a petition of a minority of the taxpayers "is a delegation of legislative powers to a minority of the voters in any county." There is no delegation of power by the legislature to a minority of the voters, or at all. Instead the legislature itself has declared the limits within which the levy must be kept and the conditions precedent to and under which a levy shall be made. Nothing is left to discretion of the board, and nothing is delegated to the board, in the way of legislative discretion, that having been fully exercised by the law-making power in the first instance. *Picton v. Cass County*, 13 N. D. 242 at 246, 100 N. W. 711, 3 Ann. Cas. 345, holding under closely analogous circumstances that such "discretion committed to the several boards (of county commissioners in tax proceedings) is administrative only," quoting the syllabus. The power of the legislature to make the provision in question is not challenged, nor could it well be. The judgment is affirmed.

BURKE, J. (concurring especially). While the above matter was pending in this court, the supreme court of Indiana handed down a decision in *Comer v. State*, — Ind. —, 110 N. E. 984, construing a similar law in favor of respondent. I do not believe this court should establish a new line of authority upon this proposition, and therefore concur in the holding above. However, I do not believe that, upon reason, the Indiana court was justified in saying that the word "annually" is equivalent to "annually, each and every year thereafter during the existence of the law," which is necessarily the result of their holding. The matter is of no particular importance in this state. If the legislature did not intend the construction which we have now placed upon the law, they can amend it to suit their wishes before another year's appropriations mature.

CHRISTINA A. BOELTER v. MRS. A. T. CRIST, as Executrix
of the Estate of A. T. Crist, Deceased.

(157 N. W. 115.)

Evidence — finding of jury — funds — property — sufficiency.

Evidence examined and held:

1. Sufficient to justify a finding by the jury that the funds claimed by plaintiff never belonged to her, but at all times had been the property of her husband.

Statute of frauds — promise by wife — debts of husband — to pay — effect.

2. Under the holding in ¶ 1, it becomes immaterial whether the statute of frauds bars a promise by the wife to pay the debts of her husband.

Transactions — bank — personal — evidence — error.

3. It was not error to allow defendant to show that the transactions in question were those of the bank, and not personal transactions.

Verdict — motion for directed — upon certain items — evidence — complaint — funds — husband.

4. The court properly denied motion to direct a verdict upon two items mentioned in the complaint. The evidence of the plaintiff, if true, would merely show that those particular funds belonged to her husband. This would not justify a verdict in her favor.

Opinion filed March 6, 1916.

Appeal from the District Court of La Moure County, *Nuessle, J.*
Affirmed.

Lawrence & Murphy, for appellant.

The wife's money cannot be used in payment of her husband's debts, without her consent in writing. *Williams v. Whiting*, 92 N. C. 683; Rev. Codes 1905, §§ 5712–5723, 5775, Comp. Laws 1913, §§ 6281–6292, 6343.

The oral promise of the husband, acting as his wife's agent, to pay his own debts out of her property, is not binding upon her. *Lowry v. Beckner*, 5 B. Mon. 41.

The statute of frauds bars any claim that appellant assumed and agreed to pay the debts of her husband. 31 Cyc. 1303, 1351, and cases cited.

Jones & Hutchinson, for respondent.

BURKE, J. Plaintiff's husband in the early days of this state filed upon and obtained title to a government homestead in La Moure county. This land remained in his name until it was sold, or possibly traded in part for another tract of land in the same county. This second tract was also taken in the husband's name, and it in turn was sold or traded to one A. T. Crist, the cashier of a bank at Dickey, North Dakota. This transaction occurred in January, 1909, and in return for the second tract of land a third tract was taken, but this time in the name of the wife, this plaintiff, Mrs. Boelter. The evidence of title was a contract for deed upon which there remained a balance due of something over \$2,000. Plaintiff's husband cropped this land in 1909, and in October of that year a sale was made of said tract for \$4,000. At that time there remained due to Crist upon the purchase price, \$2,178.75. At or about the same time, the husband held a public auction sale of his personal property at which said Crist, the cashier of the bank, acted as clerk. As a result of the sale of the personal property, \$951.10 was collected by Crist. The bank, during all this time, was a creditor of the husband and also held claims against him belonging to other parties for collection. After the sale of the third tract of land and the personal property, Crist, or his bank, had possession of about \$2,772.35 of funds belonging either to Boelter or his wife, and with these funds the bank reimbursed itself and paid the entire amount remaining upon claims it held for collection against Boelter. The bank made a full statement of its handling of this money, and the same was presented personally to the plaintiff, who later delivered it to her husband, November 26, 1909. Thereafter plaintiff and her husband removed to another part of the state. In the following spring the husband spoke to Crist about the account, and asked for the balance, if any, of the funds remaining in his hands. Crist told him that he had nothing coming. No further intimation was given to any person that the account was inaccurate until August, 1913, after Crist had died. At that time the wife, this plaintiff, insisted that the purchase price of the third tract of land belonged to her, and demanded that the estate of Crist reimburse her for the same. The trial was had to a jury, who found for the defendant upon all the issues. Plaintiff appeals, assigning errors of law occurring at the trial.

(1) Appellant insists that there was no evidence that she had author-

ized Mr. Crist to use any of her funds in payment of her husband's debts. Respondent meets this issue with the plain statement that from the evidence the jury was justified in finding, and undoubtedly did find, that the funds never had in truth and fact belonged to the wife, and that therefore she could not sue for its recovery. They further insist that the evidence would justify the jury in finding that Crist personally did not disburse the money, but that the same was disbursed by the Dickey State Bank, of which he was cashier. This requires an examination of the testimony, which we have done. We will content ourselves with printing small extracts therefrom.

Plaintiff testified that her husband was the owner of a government homestead and was about to sell the same; that she never had any title in the same, but Boelter wanted to sell the land, and I told him I would not sell until I got half.

Q. You mean the homestead?

A. Yes, sir.

Q. Go ahead.

A. Then he sold the homestead.

Q. You signed the deed with him?

A. Yes, sir.

Q. What did you do with the proceeds?

A. We bought the land at Ypsilanti.

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Q. Do you know where that deal was made by which you acquired the Ypsilanti land, or your husband got the title to it?

A. I don't remember.

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Q. Mrs. Boelter, you don't know very much about business affairs, do you?

A. No, sir, I did not.

Q. Mr. Boelter has handled your matters for you?

A. Yes.

Q. Acting as your agent in this matter, connected with this land?

A. Yes, sir.

Q. Did you ever talk with Mr. Crist, the defendant, when you got this land?

A. No.

Q. The business then, Mrs. Boelter, in regard to this transaction, was all transacted through your husband?

A. Yes, sir.

Q. You know nothing, practically speaking, regarding this matter?

A. Not very much, no.

Q. Do you know how much money you paid?

A. Yes, sir.

Q. How much?

A. Somewhere about \$2,100—\$1,800 I think was the first payment, and we made a half crop payment.

Q. When did you sell the homestead?

A. I don't remember.

Q. You farmed the land?

A. Yes, Mr. Boelter did.

Q. What arrangements did you make with Mr. Boelter?

A. He was to get half of the crop, and the other half was to go to Mr. Crist for the payment.

Q. The crop was harvested and disposed of by your husband?

A. Yes, sir.

Q. How much did you buy it for from Mr. Crist?

A. Twenty-one dollars or twenty-two dollars, I don't remember which.

A. I don't remember. Boelter handled those papers, and I didn't know much about it.

Q. You stated that the money you paid for this land came from your homestead?

Q. Was that a government homestead?

A. Yes, sir.

Q. You filed on the land?

A. Boelter did.

Q. And he proved up on it?

A. Yes, sir.

Q. Who bought the land at Ypsilanti?

A. Boelter bought it for me.

Q. It was in his name, wasn't it?

A. It was at that time.

Q. This was a government homestead, you had, was it?

A. Yes, sir.

Q. It was proved up by Mr. Boelter?

A. Yes.

Q. Did he ever deed any part of it to you?

A. No.

Q. Do you mean to say that you ever held any title to this Ypsilanti land in your own name?

A. I didn't hold any title then.

Q. State if you remember whether Mr. Boelter deeded to you or to Mr. Crist, or whether Mr. Boelter deeded that land to Mr. Crist for you; how was that, do you remember anything about that?

A. I don't understand enough about it.

Q. You don't remember whether you made a deed to Crist for this land at Ypsilanti, or whether Mr. Boelter did?

A. I don't remember.

The husband was also a witness and testified:

A. It really belonged to my wife, because when she sold it, she wouldn't sell it unless she got half the money.

After testifying to his possession of the third tract, he says:

A. There was a little granary that I had built on the place.

He also admitted owing almost all of the debts for which he had been charged by the bank.

He also testified:

Q. You acted as agent for Mrs. Boelter in this transaction?

A. Yes, sir.

Q. In fact, you conducted the whole transaction?

A. I did.

Q. She never did any business, did she, in connection with this place?

A. Not alone; I was there when she did.

Q. So far as the sale was concerned, you conducted it entirely yourself, did you not?

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Q. Did she sell it?

A. No, she did not.

Q. Who requested the sale to be made?

A. She just simply, when she went away, told me if I could sell it, to sell it.

Q. She told you to sell it?

A. Yes, sir.

Q. She put it into your hands for sale?

A. Yes, she did.

Q. You had the whole conduct of the matter in your hands?

A. I did.

Other witnesses were sworn, including Jordon, the man who purchased the land. He was a storekeeper who had a rather large account against Boelter.

His testimony, in part, is as follows:

A. He was owing me quite a bill and I talked to him about it, and he said that if he could sell that quarter of land he could pay me, but he didn't see how he could otherwise; and I asked him what he wanted for it and he said \$25, and we talked a while, and during our talk Mr. Boelter told me that he owed Mr. Roberts, the man he secured the engine to, about \$800; . . . I told him if he could do that, I would take the land.

Q. Did he say anything in this conversation relative to Mrs. Boelter owning the land?

A. No, I don't think so.

Q. Did you know anything about Mrs. Boelter owning the land?

A. No.

Q. What did you tell him?

A. I told him I would take the land, providing my claim was paid, and he said that was all right.

Q. As to this obligation that Mr. Boelter owed to you, that wasn't any debt of Mrs. Boelter's, was it?

A. It was a store bill charged to G. E. Boelter, but she came there and got goods the same as him.

Mr. Roberts, another creditor, testified that Boelter owed him \$800; that Mr. Boelter had signed the notes.

And he further testifies:

Q. Were those notes secured in any other manner?

A. Yes, sir, by an assignment of land contract. (Describing the land in suit.)

Q. Was this assignment of the contract in writing, Mr. Roberts?

A. It was.

Q. Was it attached to the contract, or not?

A. It was.

Q. Did you see Mrs. Boelter sign it?

A. I did.

Q. Personally, did you?

A. Yes, sir.

Q. Where was this assignment of the contract kept after you got it, Mr. Roberts?

A. I deposited it in the Dickey State Bank.

I dealt with the bank.

Mr. Mack, another creditor, was a witness, and testified that his transactions were entirely with the bank.

We will not unnecessarily encumber the record with further extracts of the testimony. It is sufficient to say that the jury might properly have found the taking of the contract of the third tract in the wife's name a sham and fraud. The burden was upon her to show that Crist had her money. In this the jury found that she failed. It really ends the lawsuit.

(2) The second proposition advanced by appellant is that the statute of frauds bars any claim that appellant assumed, in agreeing to pay the debts of her husband. This assignment is based upon the assumption that Crist had appellant's money. As we have seen in the foregoing, the jury may, and probably did, find otherwise. Such being the case, it was likewise proper for the trial court to submit the case to the jury in place of directing a verdict.

(3) Error is assigned upon the admission of evidence tending to show that the bank had received the money and disbursed it, and that Crist, whose executrix is the defendant in this action, had nothing to do with the transfer. It is claimed that this defense was not pleaded. The answer was a general denial coupled with an allegation that if there was any transaction between A. T. Crist, deceased, and this plaintiff, a full settlement had been had according to the instructions of the plaintiff. We do not believe this amounts to an admission of the receipt of any of the money belonging to plaintiff. Under the general denial, then, defendant could show the fact that no money had come into his hands, but that the funds were received by the bank. For this reason we believe it was proper to admit in evidence exhibit 1, which was the statement handed to this plaintiff and by her to her husband showing the disbursements made in the fall of 1909.

(4) It was next insisted that it was error to refuse to instruct the jury to return a verdict in plaintiff's favor on two items known as the Manning and Lee notes in exhibit B. Appellant insists that there is no evidence that either the husband or the wife owned either Crist or the bank or anybody else those two items, amounting to \$249.25. We cannot see why the wife should be entitled to the verdict upon those items, if they, as she claims, belonged to her husband. In fact, appel-

lant's whole case falls with the proposition which we have already stated, that there was sufficient evidence to support a finding by the jury that the funds all belonged to the husband. Judgment is affirmed.

ANNA BOOREN (MRS. L. C. BRITTEN) v. GEORGE E.
McWILLIAMS.

(157 N. W. 117.)

Civil action — defendant — bias — prejudice — people — part of county — change of venue — trial — fair and impartial.

1. The fact that a number of persons in any part of the county have a bias or prejudice against the defendant in a civil action will not justify a change of venue against the objections of the adverse party, if, notwithstanding the bias and objections of such persons, a fair and impartial trial can be had in that county.

Trial court — question for — discretion — reviewed — appellate court — abuse of discretion — proof — burden of.

2. Whether this is so is primarily for the trial court to determine, and its discretion in such matters will not be reviewed or interfered with by the appellate court unless a manifest abuse of discretion has been committed. The burden of proof of such facts being upon the movent and appellant.

Opinion filed March 6, 1916.

Action for breach of promise of marriage. Appeal from order of District Court of Towner County denying motion for change of venue, *Buttz, J.*

Affirmed.

Statement of facts by BRUCE, J.

This is an appeal from an order of the district court denying a motion by the defendant for a change of venue in a case of breach of promise to marry. The motion of the defendant was supported by ninety-one affidavits, though some of these were afterwards withdrawn

Note.—That an application for a change of venue on the ground that an impartial trial in a county is impossible is addressed to the discretion of the court is clearly set forth in note in 74 Am. Dec. 241, on change of venue, p. 244, discussing the particular cause herein involved.

by the signers, and counter affidavits were filed by them, which not merely stated that the former had been signed by mistake and that the maker had signed them without reading their contents and under the belief that they were merely petitions for a change of venue, and not affidavits, but which took a directly opposite position to that formerly expressed. Opposed to these affidavits and in opposition thereto, there were those of some 271 persons.

The affidavits for a change of venue largely state the same facts, though with some variation. These were that the defendant had resided in the county for more than twenty-five years; that he was the owner of a large quantity of land and carried on extensive farming operations; that the case had been twice tried and had excited much comment in the county, and had stirred up a great deal of antagonism and feeling; that numerous stories had been spread around reflecting upon his character; that the first case had been appealed to the supreme court and a new trial granted, and that the granting of this new trial had been given wide newspaper publicity; that on the second trial, in which a verdict for some \$13,000 had been recovered and which was set aside on account of admitted errors of law and with the consent of both parties, the publicity attending the case was only emphasized and increased; that the defendant was a Catholic, while the plaintiff was a Protestant, and that this fact had been generally known and discussed by the people of the county, and on account of the anti-Catholic campaign made throughout said county by the issuing and publication of such literature as the "Menace," the "Yellow Jacket," and the "Pillar of Fire," etc., a strong feeling and sentiment had been created throughout the said county, and the question of the religion of said parties had so entered into the discussion of the case and the supposed facts thereof, that it had become one of apparent supreme importance in the minds of a great many people, and that generally and on account of such things that the affiant believed that a fair trial could not be had in the county.

Of the affidavits in opposition to the motion, the following is a fair sample: "The undersigned being first duly sworn each for himself, deposes and says that he is a member of the board of county commissioners of Towner county, North Dakota, and is now and has been for some years last past a resident of said county, and is well and person-

ally acquainted with all the people living in his district, and is well acquainted with all the people living in said county. That on the 20th day of November, 1914, the defendant presented a paper to affiant to sign, representing to affiant that the same was a petition for a change of place of trial of the above-entitled action from said county to some other county; that affiant did not read said paper over, and at the request and solicitation of defendant signed the same; that he did not sign said paper in the presence of any notary public or any person authorized to swear him thereto, and that no person did swear him to said paper, and that said affiant understood said paper to merely be a petition; that since the signing of said paper, affiant has been informed as to the matters stated therein; that many of said matters are not true, and affiant is making this affidavit for the purpose of correcting the same. That affiant is acquainted with the taxpayers throughout said county and those who would serve as jurors in said county; that the existence of said action has not created any abnormal or great interest in said county; that the facts of said case and the merits thereof have not been argued by the citizens of said county, and have seldom, if ever, been mentioned by said citizens, and that there is no line as between those who take sides with the plaintiff and those who take sides with the defendant; that the people in and about the city of Cando do not now and never have had much of anything to say in regard to said case, and there is no intense partisan sentiment existing among the people in and about the city of Cando as to the plaintiff and the defendant or either of them; that very few people in said county know what church defendant pretends to be affiliated with, in view of the fact that defendant seldom, if ever, attends any church, and the fact that the defendant is inclined towards the Catholic Church, or the fact that he may be a Catholic, has not been generally known and discussed by the people of said county, and that there has been no anti-Catholic campaign made in said county during the past year except such as has been made by the publication of such literature as the "Menace," the "Yellow Jacket," and the "Pillar of Fire," and that the publication of such literature has been as extensively carried on in every county of the state as it has been in Towner county, and that no strong feeling or sentiment has been created in Towner county by or on account of such literature, and that very few, if any, of the readers of such litera-

ture in Towner county give any thought thereto or permit their opinions to be in any way altered thereby, and that the people of Towner county are as a class liberal and disposed to accord to one another the right to worship as they see fit, and maintain or hold no bias or prejudice against one another on account of the mode of worship; and that the religion of the defendant has not become one of apparent supreme importance in the minds of the people of said county, or of a great many of the people in said county, or of any of the people of said county, with the possible exception of a rare individual who might be narrow upon religious questions, and who might think that the defendant is a Catholic, and who might, on that account, manifest a sentiment for or against the defendant; but that affiant says that the people of Towner county generally pay no attention to such an individual; that some of the members of the jury that tried the above-entitled action at the last trial thereof were and are active members of the Catholic Church; that at the first trial of said action, including the jury present, about 150 people were present; that some of them were qualified to act as jurors and that many of them were not qualified to act as jurors; that virtually the same people, except the jurors, attended the second trial, and that the trial of said action did not create any abnormal interest in said county or any interest that is not caused by any ordinary lawsuit; and that there has never been any public excitement in said county, or any part thereof, concerning said action, and that the defendant can have a fair and impartial trial of said action in said county, and that there is no reason to believe that the defendant cannot have a fair and impartial trial of said action in said county, or that a fair and impartial trial of said action cannot be had; and that there is no prejudice in the city of Cando or the vicinity thereof, of said county, against the defendant, or said action which would or could give reason to believe that the defendant cannot have an impartial trial of said action in said county, or that an impartial trial of said action in said county cannot be had; that said board of commissioners consists of five members, to wit, William Cunningham, John Reese, Andrew Gerrard, J. H. Henkel, and William Bradshaw; that there are twenty-eight townships in said county; that the district of said Cunningham consists of the six townships 161, 162, 163 north of ranges 65 and 66 in said county, and that

the district of said Reese consists of the six townships 161, 162, 163 north of ranges 67 and 68 in said county; and that the district of said Gerrard consists of the eight townships 159, 160 north of ranges 65, 66, 67, and 68 in said county, and that the district of said Henkel consists of the four townships 158 north of ranges 65, 66, 67, and 68 in said county, and the district of said Bradshaw consists of the four townships 157 north of ranges 65, 66, 67, and 68 in said county."

Bangs, Netcher, & Hamilton, for appellant.

In an application for change of venue in a civil action, on the ground of bias and prejudice on the part of a large number of the people of the county in which the action is pending, where the affidavits of the applicant are clear and positive in their expressions, a prima facie case is made.

The opposing deponents may, in the utmost good faith and with propriety, make their affidavits against the application, showing that no bias or prejudice exists, and that defendant can have a fair and impartial trial in said county. Still that excitement and prejudice against the defendant do exist, and affiants may not know of it, is apparent, and such rebuttal affidavits are not entitled to equal degree of credit with those of the applicant. *State v. Nash*, 7 Iowa, 369; *Buck v. Eureka*, 97 Cal. 135, 31 Pac. 845; 4 Enc. Pl. & Pr. 380; *Packwood v. State*, 24 Or. 261, 33 Pac. 674.

The mere fact that even a considerable number of persons in a well-populated county may affirm that no bias or prejudice exists against defendant does not establish such to be the fact, nor does it rebut the prima facie case of defendant. *Richardson v. Augustine*, 5 Okla. 667, 49 Pac. 933; *State v. Millain*, 3 Nev. 432.

The plaintiff's evidence in this case is "weak," and "not convincing." *Booren v. McWilliams*, 26 N. D. 584, 145 N. W. 410, Ann. Cas. 1916A, 388.

Cuthbert & Smythe, and *L. H. Sennett*, for respondent.

If the objection is to the judge, he may base his decision on his own knowledge of his qualifications, on motion for change of venue. 5 Standard Enc. Proc. pp. 37, 38, and cases cited.

The appellate court will not reverse for an error not prejudicial,

nor will it disturb a finding of the trial court based upon conflicting evidence. 40 Cyc. 183, 184, and cases cited.

In such cases the burden of proof is on the moving party. 5 Standard Enc. Proc. p. 40 and cases cited; *Union Mill Co. v. Prenzler*, 100 Iowa, 540, 69 N. W. 876.

Where the showing is even equal, the order of the court refusing a change cannot be said to be an abuse of discretion. The abuse must be manifest. *Alverson v. Anchor Mut. F. Ins. Co.* 105 Iowa, 60, 74 N. W. 746, and cases cited; *Croft v. Chicago, R. I. & P. R. Co.* 134 Iowa, 411, 109 N. W. 725; Code Civ. Proc. § 58; *Wilson's Rev. & Anno. Stat.* 1903, § 4256; *Horton v. Haines*, 23 Okla. 878, 102 Pac. 124; *Gibbert v. Washington Water Power Co.* 19 Idaho, 637, 115 Pac. 924; *Power v. People*, 17 Colo. 178, 28 Pac. 1121; *Michael v. Mills*, 22 Colo. 439, 45 Pac. 429; *Doll v. Stewart*, 30 Colo. 320, 70 Pac. 326.

Upon this application, all the evidence for and against which is presented to the supreme court was before and considered by the trial court. In addition, the trial court was possessed of many facts and conditions as to local affairs in the county, not here presented. Clothed in this manner, the trial court denied the motion. Can it be said that this was an abuse of discretion? *State v. Rooke*, 10 Idaho, 388, 79 Pac. 82; *Kentucky Timber & Lumber Co. v. Daniels*, 21 Ky. L. Rep. 107, 50 S. W. 1097; *Drake v. Holbrook*, 28 Ky. L. Rep. 1319, 92 S. W. 297; *Warden v. Madisonville, H. & E. R. Co.* 125 Ky. 644, 101 S. W. 914; *Beavers v. Bowen*, 24 Ky. L. Rep. 883, 70 S. W. 195.

The facts upon such a showing must clearly justify the appellate court in reversing the lower court. *Louisiana & N. W. R. Co. v. Smith*, 74 Ark. 172, 85 S. W. 242.

All reasonable presumptions are in favor of the finding of a trial court. *Western Coal & Min. Co. v. Jones*, 75 Ark. 76, 87 S. W. 441; *Sims v. American Steel Barge Co.* 56 Minn. 68, 45 Am. St. Rep. 451, 57 N. W. 322; *Colorado Fuel & Iron Co. v. Four Mile R. Co.* 29 Colo. 90, 66 Pac. 902; *Northeastern Nebraska R. Co. v. Frazier*, 25 Neb. 42, 40 N. W. 607.

BRUCE, J. (after stating the facts as above). The question to be determined in this case is whether the trial court committed an abuse of its discretion in refusing a change of venue under the provisions of

the statute (Comp. Laws 1913, § 7418) which permits such a change "if there is reason to believe that an impartial trial cannot be had" in the county. We are satisfied that no such abuse of discretion occurred. It is, of course, well established that the matter is discretionary with the trial court, and that such discretion will not be reviewed or interfered with unless there has been a manifest abuse thereof, and that the burden of proof is upon the movent and appellant to make this fact apparent to the appellate court. *Croft v. Chicago, R. I. & P. R. Co.* 134 Iowa, 411, 109 N. W. 725; 40 Cyc. 165; 4 Standard Enc. Proc. p. 40; *State v. Gordon*, 32 N. D. 31, 155 N. W. 59; *Power v. People*, 17 Colo. 178, 28 Pac. 1121; *Michael v. Mills*, 22 Colo. 439, 45 Pac. 429; *Gibbert v. Washington Water Power Co.* 19 Idaho, 637, 115 Pac. 924; *Horton v. Haines*, 23 Okla. 878, 102 Pac. 124.

"The reason for this rule is obvious. Whether a change of venue is necessary to obtain a fair and impartial trial is not a question of law, but of fact. A judge on the spot, viewing all the circumstances, and having knowledge of persons, facts, and influences, is much better qualified than is an appellate court at a distance, with only *ex parte* affidavits before it to determine the fact whether or not it is true that the defendant cannot have a fair trial by an impartial jury in the county in which he is indicted or in which the plaintiff has commenced his suit." 4 Enc. Pl. & Pr. 499-502.

Generally the courts hold that no abuse of discretion will be presumed or inferred where there are conflicting affidavits. Generally the rule seems to be that the fact that a number of persons in any particular county have a bias or prejudice against the defendant will not justify a change of venue against the objections of the adverse party, if, notwithstanding the bias or prejudice of such persons, a fair and impartial trial can be had in that county, and this matter is primarily for the trial court to determine. *Northeastern Nebraska R. Co. v. Frazier*, 25 Neb. 42, 40 N. W. 605; *State v. Gordon*, 32 N. D. 31, 155 N. W. 59. In the case at bar, it is true that there are a number of affidavits which claim that the defendant cannot have a fair trial in the county. The counter affidavits, however, show that only some 150 persons were present at the former trial. They deny that the matter has created general excitement throughout the county as a whole. They deny that prejudice extends throughout the county. They call atten-

tion to the fact that as far as the anti-Catholic papers are concerned, their publication is just as extensive in the other counties of North Dakota as in Towner county. They are signed by persons from all over the county. Some of the signers are persons who are peculiarly qualified to know the facts, being the mayor and marshal of Cando, two of the county commissioners, and the sheriff. All these matters were peculiarly within the knowledge of the district judge, and were competent for him to consider. We are not inclined to interfere with his discretion and judgment in the matter, or to hold that the showing was made that a fair trial could not be obtained.

The order of the District Court is affirmed.

JOHN BUCHANAN, SR., Thomas Buchanan, David Buchanan, and
John Buchanan, Jr., Copartners, as John Buchanan & Sons, v. OC-
CIDENT ELEVATOR COMPANY, a Corporation.

(157 N. W. 122.)

Defendant — motion for nonsuit — denial of — evidence — participation in trial — close of case — motion not renewed — error on — cannot predicate.

1. A defendant who introduces evidence in the case after his motion for nonsuit is overruled, and fails to renew his motion at the close of the case, is not in position to predicate error upon the denial of the motion for nonsuit.

Verdict — evidence — sufficiency — question of — time to raise — trial court — supreme court.

2. Under the rule announced by this court in *Morris v. Minneapolis, St. P. & S. Ste. M. R. Co.* 32 N. D. 366, the sufficiency of the evidence to support the verdict cannot be assailed for the first time in the supreme court, but this question must first be raised in some appropriate manner in the trial court.

Evidence — rulings on — errors assigned — appeal — when considered on.

3. It is *held*, for reasons stated in the opinion, that certain errors assigned upon rulings in the admission and exclusion of evidence cannot be considered on this appeal.

Jury — instructions — nonprejudicial.

4. Certain instructions to the jury considered and *held* nonprejudicial.

Jury — instructions — error — assignment of — explicit — request for.

5. Where an instruction is correct as far as it goes, error cannot be assigned

on the ground that it was not sufficiently full and explicit unless request is made for more specific and comprehensive instruction.

Witness — questioned by court — trial — action of court.

6. It is held that the court's action in propounding certain questions to a witness does not constitute prejudicial error.

Opinion filed March 6, 1916.

From a judgment of the District Court of Foster County, *Coffey, J.*, defendant appeals.

Affirmed.

Edward P. Kelly, for appellant.

In order for respondents to maintain their cause of action as pleaded, it was incumbent upon them to prove default in payment of the notes secured, or a breach of some condition of the mortgage. *Madison Nat. Bank v. Farmer*, 5 Dak. 285, 40 N. W. 345.

In the absence of a statute, no formal language is necessary to constitute a valid demand. Any language which is so clear that it makes known what is wanted, is sufficient. 9 Am. & Eng. Enc. Law, 2d ed. 7211; *Sanford v. Duluth & D. Elevator Co.* 2 N. D. 6, 48 N. W. 434; *First Nat. Bank v. Minneapolis & N. Elevator Co.* 11 N. D. 280, 91 N. W. 436; *Best v. Muir*, 8 N. D. 44, 73 Am. St. Rep. 742, 77 N. W. 95; *Marshall v. Andrews*, 8 N. D. 364, 79 N. W. 851; *Towne v. St. Anthony & D. Elevator Co.* 8 N. D. 200, 77 N. W. 608.

A party cannot, as a general rule, impeach or offer evidence to impeach his own witness. 30 Am. & Eng. Enc. Law, 2d ed. 1138, and cases cited.

After a proper demand has been made, the party upon whom it was made has a reasonable time in which to investigate the claim before being compelled to surrender the grain or refuse to do so. *First Nat. Bank v. Minneapolis & N. Elevator Co.* 11 N. D. 280, 91 N. W. 436; *Singer Mfg. Co. v. King*, 14 R. I. 511; *Dowd v. Wadsworth*, 13 N. C. (2 Dev. L.) 130, 18 Am. Dec. 567; *Carroll v. Mix*, 51 Barb. 212.

The proper filing of the chattel mortgage is what constitutes constructive notice of its existence. Comp. Laws 1913, § 6759.

The court should have instructed the jury as to what, under the law, would constitute a legal demand, since this was the sole contested issue. 9 Am. & Eng. Enc. Law, 2d ed. 7211.

If respondents ever had a lien upon the grain in question, by their acts and conduct toward same, and to and with defendant, they waived such lien. *Moline Plow Co. v. Gilbert*, 3 Dak. 239, 15 N. W. 1.

To constitute conversion, all the elements, including a legal demand, must be clearly established. *McArthur v. Dryden*, 6 N. D. 438, 71 N. W. 125; *Gull River Lumber Co. v. Osbrone-McMillan Elevator Co.* 6 N. D. 276, 69 N. W. 691.

A mortgagee of grain who authorizes the mortgagor to sell and deliver same, and to collect the money therefor, waives his mortgage lien. *Coughran v. Western Elevator Co.* 22 S. D. 214, 116 N. W. 1122.

Lee Combs and *L. S. B. Ritchie*, for respondents.

Under the terms of the mortgage there was a default in its conditions, when the mortgagor disposed of the property, which gave the plaintiffs the right to possession, or, in case of conversion, to maintain action against the wrongdoer for its value. *Ellestad v. Northwestern Elevator Co.* 6 N. D. 88, 69 N. W. 44.

The issues here were for the jury, and, the jury having passed upon them, their determination is final. *Coughran v. Western Elevator Co.* 22 S. D. 214, 116 N. W. 1122, 7 Cyc. 50.

There is no legal evidence here of any consent by the respondents to a sale of the grain. *First Nat. Bank v. St. Anthony & D. Elevator Co.* 103 Minn. 82, 114 N. W. 265; *Riley v. Conner*, 79 Mich. 497, 44 N. W. 1040.

Consent by the mortgagee to a sale of the grain cannot be implied from the fact that the mortgagee did not take particular precaution to protect himself. His mortgage was properly filed. *Endreson v. Larson*, 101 Minn. 417, 118 Am. St. Rep. 631, 112 N. W. 628.

Where a witness is called for a party, and he discloses an attitude antagonistic to such party, he may be cross-examined or asked leading questions, at least to a degree allowed in the discretion of the trial court, under the circumstances disclosed to the court. *State v. Cambron*, 20 S. D. 282, 105 N. W. 241.

Where questions are propounded and objections are made and sustained, there can be no prejudicial error, even though the rulings may have been wrong, where the witness thereafter testified to all the facts sought to be shown by the questions excluded. *Madson v. Rutten*, 16 N. D. 281, 13 L.R.A.(N.S.) 554, 113 N. W. 872; *McBride v. Wal-*

lace, 17 N. D. 495, 117 N. W. 857; *State v. Smith*, 18 S. D. 341, 100 N. W. 740; *Nystrom v. Lee*, 16 N. D. 561, 114 N. W. 478.

The charge of the court must be considered as a whole, and error cannot be predicated on parts thereof, when the entire charge is not subject to the objection made. *Buchanan v. Minneapolis Threshing Mach. Co.* 17 N. D. 343, 116 N. W. 335.

No separated or isolated sentence or part of a charge can be selected and error predicated thereon. *McBride v. Wallace*, 17 N. D. 495, 117 N. W. 857; *Gagnier v. Fargo*, 12 N. D. 219, 96 N. W. 841.

If a party desires a more specific charge on any given point in issue, he should properly request same. *Carr v. Minneapolis, St. P. & S. Ste. M. R. Co.* 16 N. D. 217, 112 N. W. 972; *Landis v. Fyles*, 18 N. D. 587, 120 N. W. 566.

A written consent to sell a specific amount of the mortgaged grain for immediate use or accommodation of the mortgagor affords no proof of waiver of the mortgage, or a consent to the disposal of a larger amount of the grain covered by the mortgage. 34 Cyc. 1044; *Riley v. Conner*, 79 Mich. 497, 44 N. W. 1040; *Ballinger Nat. Bank v. Bryan*, 12 Tex. Civ. App. 673, 34 S. W. 451.

It was incumbent upon appellant to show that the specific grain it received from the mortgagor had been released from the effect of the mortgage. *First Nat. Bank v. St. Anthony & D. Elevator Co.* 103 Minn. 82, 114 N. W. 265.

CHRISTIANSON, J. This is an action to recover damages for the alleged conversion of certain grain covered by a chattel mortgage, executed and delivered to the plaintiffs by one Harper, the owner of the grain, and which grain was delivered and sold by said Harper in January, 1913, to the defendant at its elevator at Sykeston, in this state. The jury returned a verdict in favor of the plaintiffs for \$1,021.96. Judgment was entered pursuant to the verdict, and defendant has appealed from the judgment.

(1) At the close of plaintiff's case in chief, defendant moved for a dismissal of the action. This motion was overruled and this ruling is assigned as error. The record shows that after the denial of such motion, defendant introduced considerable testimony, and the motion was not renewed at the close of all the evidence. Hence, under numer-

ous decisions of this court, the error, if any, in the denial of defendant's motion for nonsuit was waived by defendant. See *Bowman v. Eppinger*, 1 N. D. 21, 44 N. W. 1000; *Colby v. McDermont*, 6 N. D. 495, 71 N. W. 772; *Tetrault v. O'Connor*, 8 N. D. 15, 76 N. W. 225; *First Nat. Bank v. Red River Valley Nat. Bank*, 9 N. D. 319, 83 N. W. 221; *Ward v. McQueen*, 13 N. D. 153, 100 N. W. 253; *Madson v. Rutten*, 16 N. D. 281, 13 L.R.A.(N.S.) 554, 113 N. W. 872. See also *Pease v. Magill*, 17 N. D. 166, 115 N. W. 260; *McBride v. Wallace*, 17 N. D. 495, 117 N. W. 867; *Landis Mach. Co. v. Konantz Saddlery Co.* 17 N. D. 310, 116 N. W. 333.

(2) Among the questions raised by defendant on this appeal is that the evidence is insufficient to sustain the verdict. This question was not raised in the court below either by motion for a directed verdict, or by motion for a new trial, but is presented for the first time on appeal. Under the rule announced by this court in *Morris v. Minneapolis, St. P. & S. Ste. M. R. Co.* 32 N. D. 366, 155 N. W. 861, the sufficiency of the evidence to sustain the verdict cannot be assailed for the first time in the appellate court, but this question must first be raised in some appropriate manner in the trial court.

(3) Certain errors are assigned upon rulings in the admission and exclusion of evidence. Many of the errors so assigned, however, really go to the question of the sufficiency of the evidence to establish various elements of plaintiff's cause of action, such as whether a sufficient demand was made upon the defendant; whether there was sufficient evidence of default in the payment of the notes secured by the mortgage; whether the evidence showed waiver on the part of the plaintiffs of the lien of their mortgage, and the amount of plaintiff's lien. No requests were made for instructions upon the specific questions, or at all; nor was the sufficiency of the evidence to sustain plaintiff's cause of action as a whole, or any specific element thereof, challenged in any manner in the trial court. And therefore under the rule announced in *Morris v. Minneapolis, St. P. & S. Ste. M. R. Co.* *supra*, this question cannot be raised for the first time in this court.

(4) Certain assignments of error are predicated upon the instructions to the jury. The instructions assailed are as follows:—

(a) "It is incumbent upon the plaintiffs to show you that they have in this case a valid and special lien upon the property in question; that

it has not been paid or satisfied; that it covers the identical property in question. It is further incumbent upon them to establish by a fair preponderance of evidence that the same was delivered to this defendant, the price of the grain, that they have made a demand prior to the commencement of this action for the same of the defendant company, and that it has refused and neglected to deliver the same to the plaintiffs. If you find these issues in favor of the plaintiffs, then it will be your duty to find a verdict in favor of the plaintiffs in this action for such sum as you shall find that they have been damaged from the evidence."

(b) "If you find that the grain in question was the grain described in plaintiff's mortgage, and that it was delivered to the defendant elevator company, and that the plaintiff has made a demand upon the elevator company for the grain or the value thereof, prior to the commencement of this action, then your verdict should be in favor of the plaintiff for the value of the grain, as established by the evidence and as has been proven as the value thereof and the amount of the grain."

(c) "The fact that the plaintiffs have a chattel mortgage upon certain grain is constructive notice to all parties of the fact of the mortgage and of the lien."

Appellant's counsel contends that the chattel mortgage was not a valid lien upon the grain in question, unless defendant had either actual or constructive notice thereof. It is asserted that the instructions in question omit this essential element, and hence are erroneous. The testimony relative to the execution, delivery, and recording of the mortgage was undisputed. Hence, defendant could hardly be prejudiced by the instructions under consideration. We find, however, that the court also instructed the jury as follows: "There could be no conversion until the plaintiffs have shown that they had a mortgage which is filed for record, and that it covers the property in question, and that the same was delivered to the defendant company, and that plaintiff has made a demand for the particular property or for the value thereof." This court has repeatedly held that the instructions must be considered as a whole. When the instructions in this case are so considered, defendant has no cause for complaint.

(5) Defendant further complains because the trial court failed to instruct the jury and outline "certain rules and directions that would

serve and tend to guide them in determining what, under the law as found by the evidence before them, would constitute a proper and legal demand;" and that the court's instructions upon the question of whether plaintiffs waived the lien of their mortgage were incomplete in this that, while the court instructed as to the effect of plaintiff's express consent to, or direction of, a sale of the grain, it failed to instruct upon the proposition of implied consent or directions to make such sale. It is conceded that no requests were made for further or additional instructions. In absence of such requests, defendant is in no position to complain because the instructions were not sufficiently full and explicit. In considering the same question in *McGregor v. Great Northern R. Co.* 31 N. D. 471, 154 N. W. 261, 266, we said: "Even though the instruction complained of was not entirely perfect, this would not necessarily constitute reversible error, unless it further appears that the jury were misled thereby. For 'courts of error do not sit to decide moot questions, but to redress real grievances. It is therefore a rule of nearly all the courts that no judgment will be reversed on account of the giving of erroneous instructions, unless it appear probable that the jury were misled by them.' Thompson, Trials, § 2401. The defendant made no request for any further or additional instruction; and it is difficult to see how at this time it can be heard to say that the court should have further explained or qualified the instruction in question. Where an instruction is correct as far as it goes, error cannot be assigned on the ground that it was not sufficiently full or explicit, unless request is made for more specific and comprehensive instruction."

(6) Error is also assigned upon the action of the court and adverse party in the examination of one Evans. Evans had been employed by Harper and had hauled some of the grain covered by plaintiffs' mortgage. Evans was called as a witness by the plaintiffs, and while so testifying, the court propounded the following questions to him:—

Q. Are you telling us what you know about this matter here?

A. Yes, sir.

Q. Don't you remember this, any of these transactions at all?

A. Remember the flax was sold there, sold after December 6th I do not know, Harper sold same.

Q. Not asking about what was sold; when was it hauled?

A. I don't remember when it was hauled, I do not know the dates of it.

Q. Well, how much was hauled?

A. It was about 400 bushels in the bin.

Q. Do you know if that flax was hauled to the Occident elevator or not?

A. No, not up to the Occident elevator, no.

Defendant's counsel contends that plaintiffs' counsel knew that Evans had been subpoenaed as a witness for defendant, and that Evans was called as a witness by plaintiffs for the sole purpose of discrediting him with the jury before defendant had an opportunity to call him as a witness. Defendant particularly complains of the questions propounded by the court. At the time the court propounded these questions, Evans was testifying as a witness for the plaintiffs. There is nothing to indicate that the court had any knowledge of the fact that Evans had been subpoenaed as a witness for the defendant. Nor is there anything to indicate that the trial court's examination was conducted in an improper manner. The presumption is that the court's action was occasioned by a sense of duty, that it was actuated by proper motives, and properly conducted. The testimony of Evans (as defendant's counsel concedes) was not at all satisfactory, and the questions propounded by the trial court were apparently asked for the purpose of ascertaining, if possible, the truth with reference to the matter to which Evans had testified. The court's action in propounding these questions to Evans does not constitute prejudicial error. See 21 Enc. Pl. & Pr. 990.

The judgment must be affirmed. It is so ordered.

SCHOOL DISTRICT NUMBER 94, a Corporation, v. SPECIAL
SCHOOL DISTRICT NUMBER 33, a Corporation.

(157 N. W. 287.)

School districts — boundaries — changing — property and debts — division and apportionment — arbitrators — return and findings — county auditor — awards made — taxes — levy made — indebtedness — found by the arbitrators — suit to recover — not maintainable — mandamus — remedy.

Two school districts of Cass county changed their boundaries. Arbitrators
33 N. D.—23.

were appointed to equalize the property and debts. Their decision gave to plaintiff the sum of \$239.87. *Held*, that such arbitration was pursuant to §§ 1327-1331, Comp. Laws 1913, which provide that the arbitrators shall make a return of their findings to the county auditor, who shall thereupon extend a tax against the property situate within the districts to pay the various awards, and that the same shall be paid as the taxes are collected.

It, therefore, follows that the plaintiff could not maintain a suit in law upon the indebtedness. The remedy, if any, was by mandamus to compel the arbitrators, county auditor, and other officials to proceed with the collection of the tax.

Opinion filed March 6, 1916.

Appeal from the District Court of Cass County, *Pollock, J.*
Affirmed.

M. A. Hildreth, for appellant.

In the absence of a statute, the settlement and adjustment between the parties was an arbitration and award at common law, and as such will be upheld. *Diederick v. Richley*, 2 Hill, 271; *Wood v. Auburn & R. R. Co.* 8 N. Y. 160; *Robertson v. M'Niel*, 12 Wend. 578; *Burnside v. Whitney*, 21 N. Y. 148; *Pierce v. Kirby*, 21 Wis. 125; *Conger v. Dean*, 3 Iowa, 463, 66 Am. Dec. 93; *Wood v. Tunnicliff*, 74 N. Y. 38.

At common law a parol submission is valid and binding, excepting where the controversy relates to land or to some matter to which the parties could not bind each other by parol. *French v. New*, 28 N. Y. 147.

Corporations may submit demands to arbitration in the same manner as individuals, unless there is provision in their charters, or some statute, prohibiting same. *Brady v. Meyer*, 1 Barb. 584; *Kane v. Fond du Lac*, 40 Wis. 495; *People ex rel. Benedict v. Oneida County*, 24 Hun, 413; *Campbell v. Upton*, 113 Mass. 67.

It is not necessary that there shall be an express agreement to abide by the determination and award given. The law implies all this. *Valentine v. Valentine*, 2 Barb. Ch. 430; *Byers v. Van Deusen*, 5 Wend. 268.

The mutual agreement to submit to arbitration constitutes a mutual promise and legal consideration to sustain an action. *Wood v. Tunnicliff*, 74 N. Y. 38.

This action is based on the award. It is no defense that the award is contrary to law. *Jackson ex dem. Van Allen v. Ambler*, 14 Johns. 96; *Shephard v. Watrous*, 3 Caines, 166; *Cranston v. Kenny*, 9 Johns. 212; *Mitchell v. Bush*, 7 Cow. 185.

The decision of the arbitrators is conclusive upon questions of both law and fact. *Emmett v. Hoyt*, 17 Wend. 410; *Winship v. Jewett*, 1 Barb. Ch. 173; *Fudickar v. Guardian Mut. L. Ins. Co.* 62 N. Y. 392; *Perkins v. Giles*, 50 N. Y. 228; *Morris Run Coal Co. v. Salt Co.* 58 N. Y. 667.

Arbitrators, unless restricted by the submission, may disregard strict rules of law or evidence and decide according to their sense of equity. *Boston Water Power Co. v. Gray*, 6 Met. 132; *Hazeltine v. Smith*, 3 Vt. 535; *Cushman v. Wooster*, 45 N. H. 410.

Every reasonable intendment will be made to uphold an award. *Hiscock v. Harris*, 74 N. Y. 108; *Curtis v. Gokey*, 68 N. Y. 300; *Locke v. Filley*, 14 Hun, 139; *Ott v. Schroepfel*, 5 N. Y. 482; *Caldwell v. Brooks Elevator Co.* 10 N. D. 575, 88 N. W. 700; *Unterrainer v. Seelig*, 13 S. D. 148, 82 N. W. 394.

An award can only be successfully attacked by being impeached for fraud or mistake, and can only be defended against by alleging and proving performance. *Coleman v. Wade*, 6 N. Y. 44; *Boyden v. Lamb*, 152 Mass. 416, 25 N. E. 609; *Witz v. Tregallas*, 82 Md. 351, 33 Atl. 719; *Fudickar v. Guardian Mut. L. Ins. Co.* 62 N. Y. 392; *Hoffman v. De Graaf*, 109 N. Y. 638, 16 N. E. 357; *Sweet v. Morrison*, 116 N. Y. 19, 15 Am. St. Rep. 376, 22 N. E. 276; *Henry v. Hilliard*, 120 N. C. 479, 27 S. E. 130; 2 Am. & Eng. Enc. Law, 794.

The claim the plaintiff had against the defendant has been merged in the award, and such award must be sustained; being valid, it is a bar to an action upon the original claim. *Coleman v. Wade*, 6 N. Y. 44; *Hoffman v. De Graaf*, 109 N. Y. 638, 16 N. E. 357; *Masury v. Whiton*, 111 N. Y. 679, 18 N. E. 638.

In the absence of any statutory provision, the award was a good common-law award and must stand. *Kreiss v. Hotaling*, 96 Cal. 617, 31 Pac. 740; *Fink v. Fink*, 8 Iowa, 313; *Gibson v. Burrows*, 41 Mich. 713, 3 N. W. 200.

Engerud, Holt, & Frame, for respondent.

The statute not only provides for the selection of arbitrators, but it

prescribes their duties and powers, and how they shall perform them, and how their award shall be carried into effect. The whole proceeding is statutory. Laws 1913, §§ 1327-1331.

BURKE, J. The two school districts involved in this litigation changed their boundaries pursuant to the decision in *School Dist. v. Thompson*, 27 N. D. 459, 146 N. W. 727. Pursuant to §§ 1327-1331, Comp. Laws 1913, arbitrators were appointed to equalize the property, funds on hand, and debts. Their award, among other things, allowed the plaintiff \$239.87. For some reason not apparent to this court, difficulties arose regarding the payment of this amount, and plaintiff commenced this suit, alleging in his complaint the facts already set forth, and, in part, alleging that the award aforesaid provided that school district No. 33 issue its check for \$239.87 as its *pro rata* share of indebtedness belonging to said district No. 94 at the time of the change in boundary line; that the plaintiff has performed all the orders on its part with reference to said award, and thereafter demanded of the said defendant the payment of the said sum. That defendant then, and ever since, has refused to pay the same to the plaintiff, and the same is now due and payable. "Wherefore, plaintiff demands judgment against the said defendant for the sum of \$239.87 and interest at the rate of 7 per cent per annum from April 27, 1914, besides the costs of this action." To this complaint a demurrer was interposed alleging that the complaint did not state facts sufficient to constitute a cause of action, and on its face affirmatively showed that the plaintiff has no cause of action. The demurrer was sustained by the trial court, as he says, upon the grounds that §§ 1327-1331, Comp. Laws 1913, made provision for the collection of such award by taxation, and that the remedy in case of a failure to make the levy would be mandamus to compel the officers to do their duty, and not by application for a general judgment and execution. This appeal challenges the correctness of such order. The five sections involved read as follows:

"§ 1327. Equalization of Indebtedness by Arbitration.—After the boundaries of a school district have been established as provided for in this chapter, all school districts or parts of school districts that existed as school corporations, or as parts thereof, before the taking

effect of this Code, and that are now included in one school district, shall effect an equalization of property, funds on hand and debts; or whenever the boundaries of two or more districts are rearranged, all districts affected by such change shall effect an equalization of property, funds on hand and debts. To effect this, such school board of such corporation constituting a school district under the operation of this chapter, shall select one arbitrator, and the several arbitrators so selected, together with the county superintendent, shall constitute a board of arbitration to effect such equalization. If in any case the number of arbitrators, including the county superintendent, shall be an even number, the county treasurer shall be included and be a member of such board. The county superintendent shall fix the time and place of such meeting.

“§ 1328. Tax to Equalize and Pay Previous Debts.—Such board shall take an account of the assets, funds on hand, the debts properly and justly belonging to or chargeable to each corporation, or part of a corporation affected by such change, and levy such a tax against each as will in its judgment justly and fairly equalize their several interests.

“§ 1329. Maximum Annual Tax Levy for Such Purposes.—When the amounts to be levied upon the several corporations or parts of corporations mentioned in the preceding section, shall be fixed, a list thereof shall be made wherein the amount shall be set down opposite each corporation. The whole shall be stated substantially in the form herein required for certifying school taxes, and addressed to the county auditor, and shall be signed by a majority of such board of arbitration; such levy shall be deemed legal and valid upon the taxable property of each corporation: Provided, however, That not more than 15 mills thereof shall be extended against such taxable property in any one year, and such levy not exceeding 15 mills on the dollar shall be extended as in this section provided from year to year, until the whole amount shall be so levied. The county auditor shall preserve such levies and shall extend the several rates from year to year, as above required by law for district taxes and the taxes shall be collected at the same time and in the same manner as other taxes are collected.

“§ 1330. Proceeds to be Turned over to the Respective Districts.—Opposite the several descriptions of property on the tax list shall be

entered the school districts within which it lies, and all the proceeds of these equalizing taxes shall be collected and shall be paid over to the proper school district within which the property is situated. The proceeds of taxes upon parts of districts lying outside of the district as at present constituted with which they were equalized shall be paid to the treasurer of the school district within which the property is situated; the same as hereinbefore provided for regular taxes.

"§ 1331. Maximum Tax Levy for All School Purposes.—The taxes levied for purposes of equalization shall be in addition to all other taxes for school purposes: Provided, That all taxes for school purposes, including such taxes for equalization, shall not exceed 30 mills on the dollar in any one year. The provisions of this article shall apply to and govern all school districts and parts of school districts hereafter divided or consolidated with each other or with other districts in the divisions, uniting for apportionment of their debts and liabilities or property and assets."

A perusal of the said statute convinces us that the trial court is correct. Those sections provide for the tax levy against each district in such sum as will justly and fairly equalize their several interests; for the certification by the arbitrator to the county auditor in the form of a tax levy; for the extension of this levy by the county auditor, and a provision that when the taxes are collected they shall be paid over to the district in whose behalf they are levied. The statute provides complete machinery for the collection of plaintiff's claim, and we do not believe a court should be asked to ignore this existing remedy and substitute another. The fact that the arbitrators undertook to provide a cash payment in place of the statutory method does not change the situation. Plaintiff's remedy is to compel by mandamus the statutory steps to be taken leading to a levy and payment according to law. Judgment is affirmed.

C. H. STARKE v. A. R. STEWART.

(157 N. W. 302.)

Evidence — offered as a whole — part inadmissible — separation — court not required to make — whole may be rejected — competent parts — admitted — discretion.

1. Where evidence is offered as a whole, and a part of it is inadmissible, the court is not required to separate the admissible from the inadmissible, but may properly reject the whole, although it may in its discretion admit such parts as are competent and reject such parts as are incompetent.

Account for goods sold — action on — complaint — allegations — denials in answer — issues — burden of proof — on plaintiff — essential facts.

2. In an action to recover upon an account for the value of goods sold, where in the allegations of the complaint are all put in issue by denials in the answer, the plaintiff has the burden of proof and must prove every allegation in his complaint essential to his cause of action.

Opinion filed March 13, 1916.

From a judgment of the District Court of Stark County, *Crawford, J.*, plaintiff appeals.

Affirmed.

T. F. Murtha, for appellant.

The testimony of defendant himself proved the account upon which suit is brought, and made a prima facie case. As to payment, the burden of proof shifted to defendant. *Second Nat. Bank v. First Nat. Bank*, 8 N. D. 53, 76 N. W. 504.

The defense of payment must be specifically pleaded, and the burden is on defendant to prove it. *Lokken v. Miller*, 9 N. D. 513, 84 N. W. 368; *Satterlund v. Beal*, 12 N. D. 123, 95 N. W. 518.

F. C. Heffron and *L. A. Simpson*, for respondent.

Books of account when offered and attempted to be used as evidence upon a trial must be fully identified and shown to have been kept by the party offering them, or by someone authorized to keep them, and their correctness must be established. *Comp. Laws 1913, § 7909.*

In the absence of a contrary showing, all sales are cash sales. *Baker v. McDonald*, 74 Neb. 595, 1 L.R.A.(N.S.) 474, 104 N. W. 923; *Pratt v. S. Freeman & Sons Mfg. Co.* 115 Wis. 648, 92 N. W. 368.

No motion for a directed verdict having been made, no court could direct one. Comp. Laws 1913, § 7643; *Johns v. Ruff*, 12 N. D. 74, 95 N. W. 440; *West v. Northern P. R. Co.* 13 N. D. 221, 100 N. W. 254.

Champerly is generally an equitable issue, and as such should have been tried and determined prior to the legal issues. *Estrada v. Murphy*, 19 Cal. 248; *Cotton v. Butterfield*, 14 N. D. 465, 105 N. W. 236.

CHRISTIANSON, J. This is an appeal from a judgment of the district court of Stark county. Plaintiff's complaint is as follows: "The plaintiff complains and alleges:

"1. That between the 1st day of August A. D. 1909, and the 30th day of August A. D. 1909, the Missouri Slope Brick & Tile Company, a corporation, sold and delivered to the defendant goods, wares, and merchandise of the reasonable value of and for which the defendant promised to pay the sum of \$130.93.

"2. That no part of said sum has been paid except the sum of \$20.

"3. That thereafter one E. A. Lillibridge was appointed receiver of said Missouri Slope Brick & Tile Company and duly qualified as such.

"4. That on the 2d day of April A. D. 1913, E. A. Lillibridge, Receiver of the Missouri Slope Brick & Tile Company, pursuant to the order of the district court for Stark county, North Dakota, sold and assigned to the plaintiff, C. H. Starke, the account of said Missouri Slope Brick & Tile Company against the defendant.

"5. That the plaintiff is now the owner thereof.

"Wherefore, plaintiff prays judgment for \$120.93, with interest thereon since the 30th day of August A. D. 1909, at the rate of 7 per cent per annum and for his costs and disbursements herein." Defendant's answer put in issue every allegation of the complaint. The case was tried to a jury. At the close of plaintiff's case, defendant moved for a directed verdict. The motion was granted. Judgment was entered pursuant to the verdict, and plaintiff appeals from the judgment.

Upon the trial, plaintiff sought to introduce in evidence certain books of account. The books so offered were in all five in number. Two of the books purported to have been kept by the receiver, the other three purported to be books of account of the Missouri Brick & Tile Com-

pany. In order to lay a foundation for the introduction of such books, one Lillibridge, the former receiver of the corporation, and one Elliott, his bookkeeper, were sworn and testified. The evidence showed that the receiver was appointed about August 18, 1910, or about a year after the alleged accrual of the account involved in this lawsuit. So far as the purported books of the receiver were concerned, it is conceded that all entries therein were made subsequent to August 18, 1910, and, hence, they necessarily could not contain any original entries of the alleged account against defendant.

On his direct examination, Elliott, the bookkeeper, testified:

Q. And I will now ask you, were those original entries or was the journal entry made from some other book or books?

A. These journal entries were made from the books of the Missouri Slope Brick & Tile Company. *They were taken from the balances of the Missouri Slope Brick & Tile Company.*

Q. As I understand you you took the balances shown by the Missouri Slope Brick & Tile Company's books, and carried them over into the books of the receiver of the Missouri Slope Brick & Tile Company?

Counsel for defendant: We object to that as incompetent, irrelevant, and immaterial, no proper foundation has been laid for the introduction of Missouri Slope Brick & Tile Company's books.

The Court: Overruled.

A. Took the balances of the Missouri Slope Brick & Tile Company and carried them over to the receiver's books.

The receiver testified that he had no personal knowledge regarding the correctness of the account; that he never brought suit thereon, although he was aware of the fact while he was acting as receiver, that Stewart owned real property in Stark county which would have been subject to attachment in a suit upon this claim. There is no contention that Stewart in any manner recognized the validity of the account while it was in the receiver's hands.

The plaintiff seems to be under the impression that when the balances shown on the books of the Missouri Brick & Tile Company were transcribed to, and entered upon, the books of the receiver that such entries thereby became original entries, and that such account thereby became transformed into an account in favor of the receiver, and that

the entries in the receiver's books, therefore, were competent evidence tending to show an account in favor of such receiver and against the defendant.

Under the laws of this state, "any entries in a book or other permanent form, in the usual course of business, *contemporaneous with the transactions to which they relate and as a part of or connected with such transactions*, made by persons authorized to make the same, may be received in evidence when shown to have been so made upon the testimony either of the person who made the same, or if he be beyond the reach of a subpoena of the trial court or insane, of any person having custody of the entries and testifying that the same were made by a person or persons authorized to make them in whose handwriting they are, and that they are true and correct to the best of his knowledge and belief." (Comp. Laws 1913, § 7909.)

Jones (Jones, Ev. § 569) says: "In addition to the requirement that the entries in the book of account be made in the regular course of business, it is equally essential that they constitute the party's original entries or first permanent records of the transactions in question, in order to be admissible in evidence."

If the defendant owed the account in question, such indebtedness arose by virtue of transactions which took place in August, 1909. It seems clear that any entries made by the receiver with reference thereto a year thereafter would not be contemporaneous with the transaction. And it seems equally clear that the defendant could not be affected by any act or alleged determination of the receiver that such account was outstanding against the defendant. The entries in the receiver's books were inadmissible and were properly excluded by the court.

The purported books of account of the Missouri Brick & Tile Company were kept by one Colwell, the secretary and treasurer of the company. Colwell died shortly prior to the appointment of the receiver. Elliott, the bookkeeper, had absolutely nothing to do with the concern, until after Colwell's death. Lillibridge was a director prior to that time. Neither of them claimed any personal knowledge regarding the account in question, or any of the accounts of the company. Lillibridge testified that it was the custom of the company to use sales slips. He says: "We had a regular form of slips. They were in little pads, and they showed on there just what the sale was and who it was

made to." He further testified that he rather thinks the slips of the sale to defendant would have been made by Mr. Kipp, the then manager. Kipp was not called as a witness, or his absence accounted for. Nor was any other officer of the corporation called, except Lillibridge, who, as far as his testimony discloses, held no office except that of director. Not a single witness who testified for the plaintiff had the slightest personal knowledge of the transaction in question, or whether any such transaction ever occurred. And not a single witness testified that the books were "true and correct to the best of his knowledge and belief."

The plaintiff did not offer any of the books or entries separately, but the two books of the receiver and the three purported books of the Missouri Brick & Tile Company were offered jointly. We have already held that the receiver's books were inadmissible, and this of itself justified the trial court in rejecting the entire evidence offered. "Where evidence is offered as a whole, and part of it is inadmissible, the court may properly reject the whole. It is not the duty of the court to separate the admissible from the inadmissible evidence." (38 Cyc. 1335.)

Thompson (Thomp. Trials, 2d ed. § 678) says: "Where a tender of evidence is made to prove certain facts, some of which are admissible and others inadmissible, the offer is properly rejected as a whole; the court is not bound to separate it and admit such parts of it as are competent, although it may do so in its discretion." See also *Fitch v. Martin*, 84 Neb. 745, 122 N. W. 50; *First Nat. Bank v. North*, 2 S. D. 480, 51 N. W. 96; 3 C. J. § 736, p. 827.

The plaintiff, however, contends that he proved his cause of action by the testimony of the defendant, Stewart, who was called for cross-examination. The contention is untenable. The defendant stated that in 1909 he purchased some brick, lime, and wall ties from the Missouri Brick & Tile Company, and that the goods so purchased were delivered to him by the company. He also testified that the Brick Company was indebted to him prior to such purchase. Plaintiff carefully refrained from inquiring as to whether the purchase was for cash or on credit, or whether defendant had paid for the goods purchased by and delivered to him. The presumption is that it was a cash sale. 35 Cyc. 264; *Elliott*, Ev. § 2623; *Pratt v. S. Freeman & Sons Mfg. Co.* 115

Wis. 648, 92 N. W. 368; *Baker v. McDonald*, 74 Neb. 595, 1 L.R.A. (N.S.) 474, 104 N. W. 923; *Julius King Optical Co. v. Treat*, 72 Mich. 599, 40 N. W. 912. Plaintiff contends that the defendant had the burden of proving payment of the account sued upon, and has cited *Second Nat. Bank v. First Nat. Bank*, 8 N. D. 53, 76 N. W. 504; *Lokken v. Miller*, 9 N. D. 513, 84 N. W. 368; *Satterlund v. Beal*, 12 N. D. 123, 95 N. W. 518, in support of his contentions. The authorities cited by no means justify the construction for which plaintiff contends.

Second Nat. Bank v. First Nat. Bank was an action for wrongful conversion of personal property. But in discussing the questions involved in that case the court, in passing, said: "We recognize the rule that in actions upon contract for the recovery of money, where the making of the contract is admitted and the defendant relies upon payment as a defense, such defense must be specially pleaded."

In *Lokken v. Miller*, the sale and delivery of the goods was admitted, and the answer interposed only the defense of payment. In *Satterlund v. Beal* the making of the contract was also admitted, and the sole defense was a plea of payment. That is not the condition in the case at bar. In this case every element of plaintiff's cause of action is denied. Plaintiff, therefore, had the burden of proving the allegations of his complaint.

"As is the general rule in other civil actions, the burden of proof is on the party having the affirmative of the issue. Thus, in actions to recover the price or value of goods sold the burden is on plaintiff to prove the existence and validity of the contract of sale, and the terms thereof, the price or value, the delivery and acceptance of the goods, and the amount thereof, and his compliance with the contract, or a waiver of its provision by the buyer, and he has also the burden of proving that goods delivered or tendered complied with the contract." 35 Cyc. 564.

"In an action on an account, plaintiff's account is not in its nature self-proving. Until some testimony is produced tending to prove its correctness, plaintiff shows no right to a recovery, if the account is properly controverted, and it is not necessary for defendant to offer any evidence in defense. So plaintiff must prove every other allegation in his pleading essential to his cause of action." 1 C. J. 661. See

also 16 Enc. Pl. & Pr. 179; Pollak v. Winter, 173 Ala. 550, 55 So. 828; Tolerton & W. Co. v. Sult, ante, 283, 156 N. W. 939.

The plaintiff failed to establish the material allegations of his complaint, and the trial court properly instructed the jury to return a verdict in defendant's favor.

Judgment affirmed.

HENRY PATHMAN v. JULIUS WILLIAMS.

HENRY PATHMAN v. JULIUS WILLIAMS and A. B. Doran.

(157 N. W. 293.)

Notice of trial — no note of issue — for specified term — service of — subsequent term — placed on calendar for trial — oral notice — nonprosecution — judgment for defendants — jurisdictional — trial — action — summary disposition of.

This opinion decides two above-entitled appeals.

After service of notice of trial, the court during a subsequent term, after oral notice given plaintiff's attorney of an intention by defendants to so request, placed these causes upon the calendar for trial. Later upon peremptory call judgment was awarded against plaintiff for nonprosecution in his absence. No note of issue was ever filed. *Held:*

The court had jurisdiction under § 7610, Comp. Laws 1913, to so order, notice of trial having been seasonably served. Note of issue is required for convenience, and is not a jurisdictional prerequisite to trial or summary disposition of the action.

Opinion filed March 13, 1916.

Appeals from orders of the District Court of Stark County, *Crawford, J.*, denying applications to vacate judgments.

Affirmed.

Thos. H. Pugh and *B. M. Rigler*, for appellant.

The manner of bringing a civil action on for trial is prescribed by our Code, and there is no other way, except by stipulation of parties and order of court thereon. Comp. Laws 1913, § 7610; 38 Cyc.

1271, 1275 et seq.; *Miner v. Galvanotype Engraving Co.* 30 Misc. 200, 61 N. Y. Supp. 1102.

Where no note of issue was filed prior to the term at which case was noticed for trial as by law provided, an order authorizing the filing of a note of issue *nunc pro tunc* was not sustained. *National Carbonating Co. v. Standard Aerating Co.* 47 N. Y. Supp. 1016.

Note of issue filed with the clerk is necessary where parties do not agree that case shall go on. *Oswald v. Moran*, 9 N. D. 170, 82 N. W. 741.

Delay of the court in making decision does not affect the remedy, where the party has taken timely action. *Gaar, S. & Co. v. Collin*, 15 N. D. 622, 110 N. W. 81; *Keeney v. Fargo*, 14 N. D. 419, 105 N. W. 92.

The application in this case is not an appeal to favor, but is based upon a strict legal right. *Comp. Laws 1913*, § 7610; *Cline v. Duffy*, 20 N. D. 525, 129 N. W. 75; *Freeman v. Wood*, 11 N. D. 1, 88 N. W. 721.

T. F. Murtha, for respondents.

In placing causes upon the calendar for trial, the note of issue is for the convenience and information of the court, and is not a jurisdictional prerequisite. 14 Enc. Pl. & Pr. 1063; *Elliot v. McHale*, 1 Mich. N. P. 312; *Kennedy v. Kennedy*, 18 N. J. L. 51; *Moody v. Lambert*, 18 S. D. 572, 101 N. W. 717; *Fuller v. Johnson*, 80 Conn. 493, 68 Atl. 977; *Homburger v. Brandenburg*, 35 Minn. 401, 29 N. W. 123; *Union Brewing Co. v. Cooper*, 15 Colo. App. 65, 60 Pac. 946; *Chappell v. Real Estate Pooling Co.* 89 Md. 258, 42 Atl. 936; *Meckes v. Pocono Mountain Water Supply Co.* 203 Pa. 13, 52 Atl. 16; *Snohomish Land Co. v. Blood*, 40 Wash. 626, 82 Pac. 933; *Shelby v. St. James Orphan Asylum*, 66 Neb. 40, 92 N. W. 155.

"Either party, after notice of trial, whether given by himself or the adverse party, may bring the issue to trial."

The procedure proposed by plaintiff would destroy this statutory right. *Clinton v. Myers*, 43 How. Pr. 95; *Honeywell v. Shaffer*, 18 N. Y. Civ. Proc. Rep. 336, 9 N. Y. Supp. 540; *McBride v. Langan*, 19 N. Y. Civ. Proc. Rep. 41, 11 N. Y. Supp. 626; *Myers v. Metropolitan Elev. R. Co.* 16 Daly, 410, 12 N. Y. Supp. 2; *Comp. Laws 1913*, § 7610.

The trial court was without authority to vacate the judgments entered, because more than one year had passed, after plaintiff had notice of their entry. Comp. Laws 1913, § 7483; *Sargent v. Kindred*, 5 N. D. 472, 67 N. W. 826.

Goss, J. This is an appeal from an order denying an application to vacate a judgment. The uncontroverted facts are that after issue was joined the defendant served notice of trial for the May, 1913, term of district court, but did not file the same or a note of issue because plaintiff had neglected to pay the clerk's fees for filing the cause. Another case had previously been begun by plaintiff against defendant Williams, in which notice of trial was served at the same time for the same term, and not filed for the same reasons. Both actions were begun by one Yaeck as plaintiff's attorney. Upon his leaving the state, attorney Rigler took over his practice. During the December, 1913, term of court, the attorney for defendant (quoting from his uncontradicted affidavit) had several conversations with Rigler, and was informed by the latter that attorneys Pugh and Rigler appearing for appellant had been retained by the plaintiff as his attorney in these two actions, and Rigler inquired why said cases were not upon the calendar, and was informed that the reason was that plaintiff had not paid the clerk's fees, "but that defendants in both of said actions were going to pay the clerk's fees and put the cases upon the calendar for trial; that said Rigler requested defendants' attorney not to do so until after December 20th, for the reason that he (Rigler) had been advised by plaintiff to dismiss the one action against Williams, and that the plaintiff was considering the advisability of dismissing the case against Williams and Doran; and that he (Rigler) had advised the plaintiff to dismiss both of said actions. That Rigler agreed with affiant (Murtha) that if said cases were to be dismissed that Rigler would advise affiant in writing of such dismissal and pay the costs; that Rigler never so advised affiant, and that on the 22d of December, 1913, affiant caused the papers herein (notice of trial and original answer in the one case and notice of trial, note of issue, and original answer in the other) to be filed with the clerk, and that both of said entitled causes were placed upon the calendar and posted upon the bulletin placed near the judge's bench for the advice and convenience of counsel. That Rigler saw the cases

marked down upon said bulletin for trial, and spoke to affiant concerning the same." That said cases were reached for trial and final disposition December 29th and brought on for trial on said date, whereupon the case against Williams as sole defendant when reached was dismissed for nonprosecution, while in the action against the two defendants, involving an issue of ownership and possession of personal property, a jury was called and defendants' proof submitted and a verdict directed in favor of the defendants, plaintiff not appearing. Judgments upon order were duly entered. The month following, plaintiff made applications in both cases for a vacation of the judgment, both of which were denied. These appeals followed.

There is no abuse of discretion claimed, nor could there be any in such orders under the facts. The sole error of law complained of is the placing of the cases upon the calendar for trial and their disposition accordingly. Appellant claims that, because, in the one case, no note of issue was ever filed with the clerk, the court was without jurisdiction of the cause, and in the other that, because the notice of trial and note of issue were not filed "at least eight days before the court," the court had no jurisdiction of the cause so far as authority to place it upon the trial calendar and dispose of it was concerned. Neither contention has any merit. Comp. Laws 1913, § 7610, reads: "At any time after issue and at least ten days before the court either party may give notice of trial. The party giving the notice shall furnish the clerk at least eight days before the court with a note of the issue containing the title of the action, the names of the attorneys and the time when the last pleading was served, and the clerk shall thereupon enter the cause upon the calendar according to the date of the issue. The party upon whom notice of trial is served may also file the note of issue and cause the action to be placed on the calendar without further notice on his part. There need be but one notice of trial and one note of issue and the action must then remain on the calendar until disposed of. Either party after the notice of trial—whether given by himself or by the adverse party—may bring the issue to trial." Under this statute, service of a note of issue is not required. After service of the notice of trial "at least ten days before the court," the cause is placed upon the calendar without further notice as between the parties. For the clerk's convenience and information the note of issue is required to be filed

with him, but the filing of this is directory, and not mandatory, and is in no sense a jurisdictional prerequisite after the notice of trial served in time is filed. *Moody v. Lambert*, 18 S. D. 572, 101 N. W. 717; *Kennedy v. Kennedy*, 18 N. J. L. 51. Plaintiff cites and quotes copiously from *Oswald v. Moran*, 9 N. D. 170, 82 N. W. 741, holding that upon a new trial ordered by this court on appeal service of a new notice of trial is necessary to again bring the cause upon the district court trial calendar where a motion to strike from the calendar for want of service and filing of a second notice of trial is seasonably made and overruled. Here both causes were admittedly noticed for trial, and were therefore liable to be placed upon the calendar at any time thereafter by either party. The reason the cases were not upon the trial calendar prior to the opening of the term was because plaintiff neglected to file the summons and complaint and pay the clerk's fees. He saw fit instead to throw this expense upon defendant. He is in no position to complain of what was done or the results of his own failure to give his cases proper attention. That the court had authority to dismiss for nonprosecution, and that plaintiff is not entitled to relief in the absence of a showing *prima facie* excusing such palpable neglect, has already been held by this court in *Saunders v. Harris*, 24 N. D. 236, 139 N. W. 325. The order appealed from is affirmed in each case, with costs.

WESLEY L. PAGE v. ED. A. SMITH.

(157 N. W. 477.)

Action to quiet title—adverse possession—fee holder—title established—facts sufficient.

1. Action to quiet title based on adverse possession against fee-title holder Smith and others. *Held*: Facts are insufficient to establish a title under adverse possession as required by § 5471, Comp. Laws 1913.

Note.—That a title acquired by adverse possession may be quieted and the cloud on the same removed in an action by the party holding such adverse possession is set forth on page 506 of note in 46 L.R.A.(N.S.) 487, on the use of possessory title as a weapon of defense.

The applicability of the statute of limitations to an action to remove cloud on 33 N. D.—24.

Wild land — uncultivated — uninclosed and unimproved — hay on — occasional or continuous cutting — proof of — land — adversely held — insufficient to establish.

2. Proof of occasional or continuous cutting of hay upon wild, uncultivated, uninclosed, and unimproved prairie land is not of itself sufficient to establish that the land is held adversely to the fee owner of record.

Occupancy — insufficient — taxes — payment of — fee — record holder — title.

3. Payment of taxes with such insufficient occupancy does not operate to divest title of the record holder of the fee.

Fee holder — title — quieted in — mortgage indebtedness — taxes — original mortgagee — paid by — accounting — use and occupancy — value — offset — costs — case remanding.

4. Title is quieted in the fee holder, Smith, upon condition that he pay the mortgage indebtedness, including interest, also taxes paid by the original mortgagee and assigns and interest thereon, and provided also that an accounting thereon may be had upon the value of the use and occupation of the premises during Smith's ownership to date of judgment as an offset against such taxes and mortgage indebtedness. Costs to appellant. Case remanded for further proceedings if necessary.

Opinion filed March 15, 1916. Rehearing denied April 15, 1916.

Appeal from District Court Dickey County, *Allen, J.*

Reversed and a conditional judgment directed for defendant Smith with accounting permitted.

Youker & Perry, for appellant.

The foreclosure of a real estate mortgage by advertisement, by an assignee, where his assignment has not been duly recorded, is void. *Hickey v. Richards*, 3 Dak. 345, 20 N. W. 428; *Morris v. McKnight*, 1 N. D. 266, 47 N. W. 375.

A foreign corporation, living in another state and claiming constructive title is discussed in the note in 29 L.R.A.(N.S.) 930, referred to herein in the opinion on rehearing.

The general subject of what is essential to adverse possession is discussed in notes in 28 Am. St. Rep. 158, and 88 Am. St. Rep. 701.

On what is sufficient to sustain color of title and what amounts thereto, see notes in 14 Am. Dec. 580, and 88 Am. St. Rep. 701.

As to whether color of title is necessary to adverse possession, see note in 14 Am. Dec. 764.

The necessity of color of title when not expressly made a condition by statute to found title by adverse possession is also discussed in note in 15 L.R.A.(N.S.) 1178.

tive possession of real estate only by virtue of a sheriff's deed, based on a void foreclosure, and not coupled with any act of continuous, open, notorious, and hostile occupancy of a tract of wild, vacant, and unimproved lands, cannot be said to be within the contemplation of the statute granting relief in actions to quiet title. *Enderlin Invest. Co. v. Nordhagen*, 18 N. D. 517, 123 N. W. 390; *J. B. Streeter Jr. Co. v. Fredrickson*, 11 N. D. 300, 91 N. W. 692; *Timmons v. Kidwell*, 138 Ill. 13, 27 N. E. 756; *Dawley v. Van Court*, 21 Ill. 460; *Fell v. Cessford*, 26 Ill. 525; *Jayne v. Gregg*, 42 Ill. 413; *Stiles v. Granger*, 17 N. D. 502, 117 N. W. 777; *Krueger v. Market*, 124 Minn. 393, 145 N. W. 30.

Payment of taxes under color of title does not of itself constitute possession. In this case the taxes for some years during the statutory period were paid by strangers. *Cornell University v. Mead*, 80 Wis. 387, 49 N. W. 815; *Miller v. Davis*, 106 Mich. 300, 64 N. W. 338; *Joy v. Midland State Bank*, 26 S. D. 244, 128 N. W. 147; *Illinois Steel Co. v. Budzisz*, 115 Wis. 68, 90 N. W. 1019.

In order to work disseisin and maintain adverse possession, such possession must be open, continuous, notorious, distinct, hostile, and visible. *Paldi v. Paldi*, 95 Mich. 410, 54 N. W. 903; 1 Cyc. 990-992, and citations; *Jasperson v. Scharnikow*, 15 L.R.A.(N.S.) 1178, note; *Markusen v. Mortensen*, 105 Minn. 10, 116 N. W. 1021; *Hafner v. Chase*, 146 Iowa, 231, 124 N. W. 1087; *Lanning v. Musser*, 88 Neb. 418, 129 N. W. 1022; *Bazille v. Murray*, 40 Minn. 48, 41 N. W. 238; *Forey v. Bigelow*, 56 Iowa, 381, 9 N. W. 313; *Haseltine v. Mosher*, 51 Wis. 443, 8 N. W. 273; *Whittlesey v. Hoppenyan*, 72 Wis. 140, 39 N. W. 355.

The possession must be of such a character as will raise the presumption of notice to the world that the right of the true owner is invaded intentionally, and so patent that the owner could not be deceived. *Murphy v. Doyle*, 37 Minn. 113, 33 N. W. 220; *Chabert v. Russell*, 109 Mich. 571, 67 N. W. 902; *Grube v. Wells*, 34 Iowa, 148; *Proprietors of Kennebec Purchase v. Springer*, 4 Mass. 416, 3 Am. Dec. 227; *St. Louis, A. & T. H. R. Co. v. Nugent*, 152 Ill. 119, 39 N. E. 263; *Murray v. Hudson*, 65 Mich. 670, 32 N. W. 889; *Glencoe v. Wadsworth*, 48 Minn. 402, 51 N. W. 377.

Webb & Brouillard and *E. E. Cassels*, for respondent.

When an adverse possession of real property has continued for a sufficient length of time so that the remedies of the owner to recover the land have become barred by the statute of limitations, the title to such premises is divested, and becomes vested in the adverse occupant. *Sprecker v. Wakeley*, 11 Wis. 433; *Rogers v. Benton*, 39 Minn. 39, 12 Am. St. Rep. 613, 38 N. W. 765; *Brown, Limitations & Adverse Possessions*, §§ 1-4, and cases cited in notes to § 4; *Campbell v. Holt*, 115 U. S. 620, 29 L. ed. 483, 6 Sup. Ct. Rep. 209; *Chapin v. Free-land*, 142 Mass. 383, 56 Am. Rep. 701, 8 N. E. 128.

The appellant having denied respondent's title and alleged title in himself by way of counterclaim, as in this action, he thereby becomes, as to his claim of title, the plaintiff. *Backus v. Burke*, 63 Minn. 272, 65 N. W. 459; *Jones, Mortg.* 6th ed. §§ 715, 716 and cases cited; *Nash v. Northwest Land Co.* 15 N. D. 566, 108 N. W. 792; *Mears v. Somers Land Co.* 18 N. D. 384, 121 N. W. 916; *Houts v. Hoyne*, 14 S. D. 176, 84 N. W. 773.

Where a man knowingly, but passively, suffers another to purchase and expend money on land under an erroneous opinion and belief of title, without making known his own claim, he will not be permitted to exercise his legal rights against such person. He is estopped to make an adverse claim. *Shelby v. Bowden*, 16 S. D. 531, 94 N. W. 416; *Wampol v. Kountz*, 14 S. D. 334, 86 Am. St. Rep. 765, 85 N. W. 595; *Murphy v. Dafoe*, 18 S. D. 42, 99 N. W. 86; *Dimond v. Manheim*, 61 Minn. 178, 63 N. W. 495; *Kirk v. Hamilton*, 102 U. S. 68, 26 L. ed. 79; *Close v. Glenwood Cemetery*, 107 U. S. 466, 27 L. ed. 408; *State ex rel. Miller v. Graham*, 21 Neb. 329, 32 N. W. 142; *Gillespie v. Sawyer*, 15 Neb. 536, 19 N. W. 449; *Simmons v. Burlington, C. R. & N. R. Co.* 159 U. S. 278, 40 L. ed. 150, 16 Sup. Ct. Rep. 1; *Kenny v. McKenzie*, 25 S. D. 485, 49 L.R.A.(N.S.) 782, 127 N. W. 597; *Pom. Eq. Jur.* § 965.

This particular effect or condition arises from motives of equity and fair dealing to create and vest opposing rights in the party who obtains the benefit of the estoppel. *Pom. Eq. Jur.* §§ 804, 965; *Horne v. Coe*, 51 N. H. 287, 12 Am. Rep. 111; *Murphy v. Dafoe*, 18 S. D. 42, 99 N. W. 86; *Gillespie v. Sawyer*, 15 Neb. 536, 19 N. W. 449; *Kirk v. Hamilton*, 102 U. S. 68, 26 L. ed. 79; *Wendell v. Van Rensselaer*, 1 Johns. Ch. 344; *Kenny v. McKenzie*, 25 S. D. 485, 49 L.R.A.(N.S.) 782, 127 N. W. 597.

Goss, J. Plaintiff brings action to quiet title, claiming ownership in fee simple to a quarter section of land in Dickey county. Besides defendant Ed. A. Smith and wife several mortgagees and assigns are made defendants. Smith answering asserts ownership in fee simple and asks affirmative relief. A reply was interposed derailing title in plaintiff through foreclosure of a mortgage given by one Conser for \$350 to James Reckitt, Fannie Saunders, and Ashby Varley Saunders. That said mortgage had been foreclosed by advertisement and sale in 1892 by the Colonial & United States Mortgage Company of England as assignee of the mortgage, with a certificate on foreclosure issued to said mortgage company as purchaser on sale. That a sheriff's deed had been issued thereon September 20, 1899, no redemption having been made. The sheriff's deed ran to said mortgage company as grantee. That it immediately went into possession thereunder. That through mesne conveyances plaintiff subsequently became the owner of said land. That said mortgage company and its grantees have ever since 1899 been in the open, notorious, and adverse possession of said premises, and has "held for more than ten years adverse to defendant's alleged claims, and that the alleged cause of action set forth in defendant's answer, if any, accrued more than ten years prior to the commencement of this action." The trial court found for the plaintiff, and defendant Smith appeals, demanding a trial *de novo*.

The issue is mainly one of fact concerning adverse possession under § 5471, Comp. Laws 1913. In brief the facts are that Eli P. Conser made final proof and received receiver's receipt therefor upon the land in question November 3, 1883, and on November 10th following Conser and wife mortgaged the premises for \$350 to James Reckitt, Fannie Saunders, and Ashby Varley Saunders, which mortgage, according to the abstract in evidence, contained a power of sale and was recorded soon after given. Three years later, or March 22, 1886, Conser and wife mortgaged said premises to Katie M. Smith, defendant's wife, for \$100, which mortgage has never been satisfied of record. A year later and on January 4, 1887, Conser and wife conveyed said premises by warranty deed for a consideration of \$170.35 to defendant Ed. A. Smith. June 4, 1892, a sheriff's certificate of sale on foreclosure was issued to the Colonial & United States Mortgage Company, Ltd., as purchaser in a foreclosure made by that company as assignee of said

\$350 mortgage, but which assignment, if any existed, has never been recorded. Upon the sheriff's certificate issued in 1892 a sheriff's deed on foreclosure was obtained in 1899, running to said mortgage company as grantee therein. In August, 1902, said mortgage company grantee conveyed by warranty deed to M. W. Hill, in performance of a contract of purchase entered into some two years before. The same month Hill and wife convey to the Sioux Valley State Bank of Iowa, which in turn deeds to the Bailey State Bank of Iowa, which transfers to Joseph Knox, who mortgages back to the bank May 16, 1911, and subsequently deeds in May, 1912, to this plaintiff, Wesley L. Page, subject to the mortgage to the bank. In 1913 plaintiff brings this action. So far as the record title is concerned defendant Smith is the holder thereof, the foreclosure being void under *Hebden v. Bina*, 17 N. D. 235, 138 Am. St. Rep. 700, 116 N. W. 85, and earlier cases, including *Higbee v. Daeley*, 15 N. D. 339, 109 N. W. 318, and the recent decision of *D. S. B. Johnston Land Co. v. Mitchell*, 29 N. D. 510, 151 N. W. 23, and plaintiff's title if absolute must be derived from the adverse possession pleaded as ripening into ownership during the interval since Smith has been the record owner. Amplifying the facts concerning this possession, the following is shown from the record: That the foreign mortgage company maintained an office in St. Paul in charge of one Eastman as manager; that the foreclosure instituted in 1892 was noticed by publication in a newspaper of the defendant Smith; that later, upon examining the record, Smith ascertained that there was no assignment of the mortgage from the mortgagees to the mortgage company purporting to foreclose as assignee of the mortgage. Subsequently during the purported year of redemption Smith went to said mortgage company's nearest local office in St. Paul and discussed with Eastman the validity of the foreclosure, informing him that their assignment was not of record, and "that if he could give me (Smith) an assignment of this mortgage, and would get it so I could put it on record, and would give me a satisfaction or get a satisfaction from Reckitt and Saunders, I was ready to pay up the mortgage with interest and all taxes. He objected to that because they would lose the costs of the foreclosure. He wanted me to pay that also. And while we were having conversation another man came into the office, and the case was stated to him,—he appeared to be connected with the office, I

don't remember his name,—and after the case had been stated to him he said to Eastman: 'If what Smith states is true perhaps you would better let him pay up, but I would like to look it up a little further before giving him a definite answer.' Eastman finally said to me that 'if I find your statements are true and correct, and the situation as you say it is, we will try and get this assignment and fix up the matter as you suggest;' and he mentioned the taxes, and said that he personally paid the taxes, and I told him any taxes he paid I would repay him or any that he had to pay in the future,—if he had an assignment that he would probably be held to be still standing as mortgagee and he had a right to pay the taxes, and that I would repay him. And he said to me then if I would deposit the money with him he would give me a receipt for it. I told him that if he had any right to the money on the mortgage belonging to the Colonial company and was willing to give me a receipt, he might as well give me a satisfaction; that I didn't know he had any right to the money, and that I would pay it just as soon as he could show me he had a right to it. Sometime about a year afterwards I wrote them and asked what they had found out about it and got a letter, a very short letter, to the effect that they were not prepared to adjust the matter. I think that was somewhere about a year afterwards." Meanwhile six years elapsed before a deed was taken on the purported foreclosure prior to which time Hill had purchased the land. During all these years, and down until 1907, the land remained wild, unimproved, uncultivated prairie, unfenced and abandoned so far as visible evidences thereon of ownership and occupancy were concerned. During several years of this time the hay had been cut by a tenant of Hill's who had land adjoining or by others. The taxes had been paid by the mortgage company down to the time of Hill's purchase and thereafter by subsequent grantees. Smith did not concern himself about the land, first visiting it in 1908. In 1907 the bank, by subletting, caused 70 acres to be broken on this tract, and the following year 50 acres and in 1909 25 acres more. The land has been cropped, improved, and occupied adversely to Smith since 1907. But the evidence concerning occupancy and possession prior to that date affirmatively shows nonoccupancy, and that continuously from the time of the attempted foreclosure up to 1907 there was nothing in that direction upon which can be predicated that actual, open, continuous, ad-

verse, and undisputed possession necessary under § 5471, Comp. Laws 1913, to ripen occupancy under claim of title into a title by operation of that statute of limitations, in such an occupant, who for a period of ten years shall have paid all taxes levied thereon. The facts are closely parallel with those in *D. S. B. Johnston Land Co. v. Mitchell*, 29 N. D. 510, 151 N. W. 23, from page 528 of which we quote: "It is undisputed that the land was wild, prairie land without a vestige of improvement, and at the most it is merely contended that plaintiff's possession thereof was constructive only and such as it would obtain by reason of the fact that on a few occasions it entered into leases with third persons authorizing them to cut hay thereon. Such acts fall far short of constituting actual, open, and notorious possession sufficient to set the champerty statute in motion. This is decided by this court in *State Finance Co. v. Beck*, 15 N. D. 374, 109 N. W. 357, the syllabus reading: 'The occasional cutting and removal of hay from unoccupied lands under a permit from one claiming title adverse to the plaintiff's grantor is not sufficient to constitute adverse possession so as to avoid plaintiff's deed for maintenance.' . . . It will be seen by an examination of the opinions that such cases [contrary holdings on fact] are predicated upon actual, open, and notorious possession. The attempted foreclosure of the commission mortgage being ineffectual to convey the legal title to the plaintiff, . . . it follows of course that Harrington, the defendants' grantor, and not this plaintiff, had the constructive possession of the premises which flowed from his legal title [citing authorities]. In the latter cases it was correctly held that unimproved and unoccupied land is deemed to be in the possession of the holder of the legal title, and not in the holder of the title under void judicial proceedings." See also note in 15 L.R.A.(N.S.) 1178, at page 1189, et seq. It is true that one of the officers of the mortgage company attempting this foreclosure has testified that "the company went into possession of the property on completion of foreclosure proceedings in 1892." But the witness must have had reference to constructive, and not actual, possession, as all of the witnesses familiar with the land testify to the contrary so far as the facts of possession and occupancy are concerned, and the witness referred to was not cross-examined. And the testimony of the witness Cook, for thirty years a resident within a mile of this land, is convincing to the contrary, and

is in entire harmony with the facts and practically in agreement with plaintiff's own witnesses establishing an entire want of actual and open occupancy and possession by anyone. As but six years has elapsed between the time when the statute was set in motion and this suit was commenced, payment of taxes for the earlier period is immaterial so far as title based on possession and payment of taxes is concerned. Plaintiff must recover upon the strength of his own title, the basis of which must be at least ten years of actual, open, and notorious adverse possession coupled with payment of taxes thereunder for ten years. He has no such basis in the proof. Rather the weakness of his title is plainly apparent. Such being the case, he can recover only to the extent of having determined his lien as equitable assignee of the mortgage and for taxes paid.

The legal title and ownership of the tract is in Ed. A. Smith, the defendant, and has been at all times since January 4, 1887, of which fact the mortgage company and assigns, including this plaintiff, have had constructive notice upon the recording of said deed March 27, 1887.

The authorities cited in respondent's brief are not in point under the proof. The trial court perhaps was misled, as respondents apparently have been, in deeming the facts parallel with those of *Mears v. Somers Land Co.* 18 N. D. 384, 121 N. W. 916, but that precedent should be distinguished on facts from the case at bar. That decision is based not alone upon the statute in question, but upon the finding that such occupancy as was had by the mortgagees in possession was "with the full knowledge and implied acquiescence" of the title holder.

"Furthermore they had actual notice before they purchased that the Somers Land Company claimed to own said land, as the correspondence in evidence discloses. Not only this, but they in fact negotiated with said company for the purchase of such land, and actually accepted and offered to purchase the same upon specified terms, which they afterwards repudiated. Such correspondence was, we think, clearly admissible. In the light of these facts, plaintiffs stand in no more favorable position in a court of equity than would their grantors," who had actual notice and had impliedly acquiesced in the possession for years of the mortgagees. Then again: "It was not necessary that Russell and the land company should have been in the open, visible, and notorious possession of the land sufficient to raise a presumption of

notice to Mears and wife [record owners] that their rights were invaded by them with a purpose to assert an adverse claim of title thereto, as the evidence clearly discloses that Mears and wife, by their conduct, must have had actual knowledge of appellants' hostile claim." And for the same reasons *Nash v. Northwest Land Co.* 15 N. D. 566, 108 N. W. 792, is not an authority in this case, as disclosed by the following from the opinion: "Their silence is explainable, consistently with honest and intelligent conduct on their part, only on the theory that they consented to and acquiesced in the possession on the part of the mortgagee and its successors. The authorities therefore hold that consent will be implied under such circumstances." 15 N. D. 573.

Respondents claim an estoppel against Smith because "he failed and neglected to pay the principal, interest, and taxes, or to assert any right to any of the rentals, or to exercise any of the rights of ownership. Such conduct on the part of the defendant clearly amounts to an abandonment, and precludes him from now recovering the same because of his own conduct." But none of the cases cited to sustain this doctrine hold mere nonaction in such respects to amount to estoppel under circumstances disclosed by the evidence. Defendant has testified to his efforts toward payment of the mortgage during the alleged period of redemption. In fact there was no period of redemption because the foreclosure proceedings were void *ab initio*. The attempt to foreclose was ascertained by Smith to have been without either an assignment or any proof of ownership of record, or in fact in the mortgage at that time. The mortgage was owned by parties in England, and was only one item of \$24,000 of mortgages drawn to these mortgagees, and negotiated through the agency of the mortgage company. In fact, under the proof as made, the mortgage company has not even yet produced an assignment. Instead it relies only on circumstantial evidence and oral testimony explanatory of its books to establish that it ever became the equitable owner of the mortgage. And such proof was only made after this suit was pending. This perhaps is the reason Eastman wrote Smith that he had not been able to adjust matters so as to receive his money, being aware that he had been ready to pay. Besides, the company had full notice of the invalidity of the foreclosure, and was told by Smith that he could not, with business prudence, in safety make payment of this mortgage to them as purported claimants thereof, without taking risks of their ownership of the mort-

gage. An assignee of a mortgage demanding payment of it certainly has the burden of showing ownership of it to the inquiring landowner who has assumed its payment. To fail to exact such proof precludes a plea of payment by the mortgagor if made to an unauthorized person though under circumstances identical with those confronting Smith at the time of his conversation with Eastman. *Trubel v. Sandberg*, 29 N. D. 378, 150 N. W. 928. Defendant Smith certainly did all that the law required toward ascertaining to whom to make payment of this mortgage. The mortgagee owed him some duty in that respect. If he was negligent it was more so. That it actually asserted no title under its foreclosure is apparent from the fact that it took no sheriff's deed for six years after sale, and that it knew the foreclosure to be invalid. Of this and the fact that no assignment was of record and that the foreclosure was void, Hill and all subsequent purchasers had constructive notice, and are in no better position than was the mortgage company. As to payment of taxes that alone does not estop the owner from asserting title where such payment is not accompanied with the statutory actual, open, adverse, and undisputed possession of the party paying them. Nor did Smith's failure to exercise any rights of ownership alone preclude him from still asserting it. When he became owner this land was unoccupied, wild, and unimproved. He certainly had the legal right to let it lie in that condition if he saw fit. Smith is not estopped from asserting his title simply by his nonaction.

Both parties have asked for general equitable relief. But both have staked their recovery upon an issue of title. It would be inequitable to quiet title in Smith without requiring the payment of this mortgage, interest, and taxes paid during these many years. But it would be equally unjust to Smith to require such payment of him without requiring plaintiff in possession to account for the value of the use and occupation throughout said years. If he should be paid this mortgage, interest, and taxes he should account for the value of the occupancy whether by him or his assignors, inclusive of the original mortgage. None of these issues were raised in the pleadings; nor is there sufficient proof upon which to make an equitable final disposition of the case in this court. The cause is therefore remanded with direction to quiet title in Smith to said premises, subject to the rights of the plaintiff and Smith to file additional pleadings and thereunder litigate the amount, if any, that defendant Smith should pay plaintiff Page as a

condition precedent to the entry of final judgment quieting title in Smith to said premises. Said amount is to be determined by the trial court by reference to the following items and matters, to wit: Defendant Smith must pay plaintiff the amount of said mortgage, \$350, together with straight simple interest thereon at the mortgage rate from its date, November 10, 1883, to the date of entry of judgment herein, or for a term of approximately thirty-three years, without division of said term in the computation of interest. To this amount there shall be added the amount of all taxes paid, with interest. In the computation of taxes each year's tax shall be taken, together with 7 per cent interest per annum from the date of payment, to the date of entry of judgment, as one interest term; any taxes that may have been paid by plaintiff subsequent to the commencement of this action shall be included. That no costs shall be allowed or added to the mortgage because of the attempted foreclosure in 1892. That should plaintiff demand a recovery therefor, defendant Smith shall be charged with the value of any and all permanent improvements (but not inclusive of costs of plowing or breaking) placed upon said land. As against this aggregate amount found to be due in equity from the defendant to plaintiff, there shall be offset the value of the use and occupation of said premises according to the use made thereof as may be disclosed by the proof, should defendant Smith claim the same by pleadings and litigate said issue; the value of said use and occupation to cover the entire period of time during which the mortgage company or any of its assigns, including this plaintiff, may have realized any profit whatsoever out of said premises since Smith purchased them, to the effect that the plaintiff shall be charged therewith as an offset against any sum in equity due him from Smith. With this indication as to the relief that may be granted upon issues to be formulated, the cause is remanded. Conditioned further that upon Smith's depositing in district court or such bank as the court may direct, to abide the result of the accounting, the amount of said mortgage indebtedness and taxes to be paid by him, he shall be let into immediate possession of said premises. Appellant will recover costs on appeal and on trial, to be deducted from the amount necessary to be paid by him as a condition to entry of judgment quieting his title.

Judgment appealed from is ordered reversed.

On Petition for Rehearing Filed April 15, 1916.

Goss, J. In a petition for rehearing, plaintiff contends that § 7381, Comp. Laws 1913, bars defendant's recovery of judgment for title. That section reads: "An action for relief not hereinbefore provided for must be commenced within ten years after a cause of action shall have accrued." Plaintiff asserts that under the statute governing trials of equitable counterclaims in adverse claims suits, § 8153, Comp. Laws 1913, defendant is to be regarded as a plaintiff bringing this action and therefore barred from relief for not bringing suit within ten years from time his cause of action accrued. This statute reads: "A defendant interposing a counterclaim shall, for purposes of trial, be deemed plaintiff, and the plaintiff and codefendants against whom relief is sought shall be deemed defendants as to him."

Several answers can be made to plaintiff's contention. Neither this statute of limitations nor the practice statute as to equitable counterclaims can apply. If defendant is not barred by the adverse possession statutes, § 5471, as held in the main opinion, he is certainly not barred by the ten years statute, § 7381. To so hold would be to find no necessity for the former statute in such cases. Another conclusive answer is that defendant has "commenced" no action within the meaning and terms of § 7381. He has begun no action whatever, but so far as that statute is concerned is a defendant, and not within its terms. Nor does § 8153 regulative of trials in actions already brought purport to change the situation as to who must bring the suit to be within § 7381, the limitation statute. The statute governing trials expressly states that "for purposes of trial he (defendant) shall be deemed plaintiff." This excludes by necessary inference any conclusion that a defendant is to be deemed plaintiff for any other purpose than for "purposes of trial." This statute cannot supplement § 7381 in the manner contended for, even though the limitation statute as so supplemented could be held applicable.

Another answer to plaintiff's claim is that defendant Smith, the fee owner, may maintain an action to remove any cloud on his title, and no defense of outlawry as against such an action could be interposed. "A cloud upon a title must always continue to operate as such during the period of its existence; and as its effect upon the title is continuing, the

cause of action resting on the right of the owner to have it removed would seem to be continuing also and to be available at all times while the cloud remains." *Cooper v. Rhea*, 29 L.R.A.(N.S.) 930, and note (82 Kan. 109, 136 Am. St. Rep. 100, 107 Pac. 799, 20 Ann. Cas. 42).

Another reason for refusing application of § 7381 is that as to plaintiff, if otherwise available as a plea by him against defendant, he has not ten years' possession to set up against defendant's title. As to plaintiff, defendant is asserting his cause of action within less than ten years from the time defendant's cause of action for possession accrued by reason of plaintiff's occupancy, assuming possession of plaintiff's grantors could be tacked. 1907 was the earliest prior actual occupancy or possession of the premises that can be asserted by anyone other than Smith, and be within the facts. Until then defendant's legal title drew to him constructive possession, which was broken only by actual possession in 1907. No ten-year statute could have run as against defendant.

The contention for rehearing based on laches was sufficiently answered in the main opinion.

Rehearing is denied.

BANK OF MOWBRAY v. JERRY KELLAND, Sheriff of Cavalier County, North Dakota, **W. F. Winter** and **H. D. Allert**, Copartners as Allert & Winter.

(157 N. W. 291.)

First mortgage — real estate — foreclosed — redemption period — mortgagor — fourth mortgage — redemption by — paying first mortgage debt — after year has expired — within sixty days — amount required — interest — taxes.

1. Where a first mortgage is foreclosed, and during the year of redemption

Note.—While not strictly in point with the above case, the note in 29 L.R.A.(N.S.) 508, on whether a purchaser or mortgagee from the original owner after a sale under a prior mortgage and during the redemption period may be a redemptioner, may prove of interest, the case annotated being *North Dakota Horse & Cattle Co. v. Serumgard*, 17 N. D. 466, 117 N. W. 453.

which is allowed to the mortgagor, the holder of a fourth mortgage redeems from such sale, by paying the first mortgage debt, the owner of a second mortgage may, under the provisions of § 7755, Compiled Laws of 1913, in turn redeem from such fourth mortgagee and within sixty days of his redemption, even though after the expiration of the original year, and by paying to such fourth mortgagee the amount which he paid to redeem with interest and taxes and assessments paid by him with interest, but without paying to such subsequent encumbrancer the amount of his fourth mortgage.

Partnership — superior lien holder — redemption by — inferior lien holder — estoppel — sheriff's certificate — purchase by.

2. A partnership which as a superior lien holder and under the provisions of § 7755, Compiled Laws of 1913, seeks to redeem from a prior redemptioner but inferior lien holder who has redeemed during the year of redemption under the provisions of § 8085, Compiled Laws of 1913, is not estopped from so doing on account of the fact that prior to such event one of its members purchased the sheriff's certificate of sale which was issued on the foreclosure of the first mortgage and under which both redemptions are sought to be made.

Opinion filed March 15, 1916.

Appeal from the District Court of Cavalier County, *Charles M. Cooley*, Special Judge.

Action to compel the delivery of sheriff's deed on a mortgage foreclosure sale.

Judgment for defendants. Plaintiff appeals.

Affirmed.

George M. Price, for appellant.

Redemption from the purchaser of real estate mortgage foreclosure must be made within one year. *Franklin v. Wohler*, 15 N. D. 613, 109 N. W. 56; *Kenmare Hard Coal, Brick & Tile Co. v. Riley*, 20 N. D. 182, 126 N. W. 241; *Nichols v. Tingstad*, 10 N. D. 172, 86 N. W. 694; *Laws 1887, § 5151, Comp. Laws 1913, § 7754*; *Trenery v. American Mortg. Co.* 11 S. D. 506, 78 N. W. 991; *Johnson v. Day*, 2 N. D. 295, 50 N. W. 701.

A possible redemptioner who remains inactive during the entire period of redemption, and permits an actual redemptioner to receive a sheriff's deed, thereby loses his right of redemption. *MacGregor v. Pierce*, 17 S. D. 51, 95 N. W. 281; 27 Cyc. 1810; *North Dakota Horse & Cattle Co. v. Serumgard*, 17 N. D. 466, 29 L.R.A.(N.S.) 508, 138 Am. St. Rep. 717, 117 N. W. 456.

A subsequent redemptioner has the right to redeem by paying the amount the original redemptioner paid, without paying any other lien held by him which is inferior to the lien of the subsequent redemptioner seeking to redeem. *Advance Thresher Co. v. Rockafellow*, 16 S. D. 462, 93 N. W. 653; *Work v. Braun*, 19 S. D. 437, 103 N. W. 764; 27 Cyc. 1813, 1814; *Long v. Mellet*, 94 Iowa, 548, 63 N. W. 190; *Albee v. Curtis*, 77 Iowa, 644, 42 N. W. 508; *Bartleson v. Thompson*, 30 Minn. 161, 14 N. W. 795.

Redemption is a statutory right, and while the statutes are liberally construed, to effect their purposes, still the person seeking to redeem must bring himself within the statute and must comply therewith. *Summerville v. Sorrenson*, 23 N. D. 460, 42 L.R.A.(N.S.) 877, 136 N. W. 938; *Comp. Laws 1913*, §§ 7754-7756; *Pamperin v. Scanlan*, 28 Minn. 345, 9 N. W. 870, and cases cited; *Jack v. Cold*, 114 Iowa, 349, 86 N. W. 377; *Parke v. Hush*, 29 Minn. 434, 13 N. W. 668; *Buchanan v. Reid*, 43 Minn. 172, 45 N. W. 11.

The situation presented here is not that of a junior lien holder trying to enforce that lien as a prior lien to the senior lien, but on the contrary, it is that of the senior lien holder lying still and permitting and in fact obliging a junior lien holder to redeem and then attempting to assert the senior lien as against the junior lien holder. The doctrine of laches and estoppel will not permit him to do so. *North Dakota Horse & Cattle Co. v. Serumgard*, 17 N. D. 466, 29 L.R.A.(N.S.) 508, 138 Am. St. Rep. 717, 177 N. W. 453; *Warford v. Sullivan*, 147 Ind. 14, 46 N. E. 27; 37 Cyc. 383; 11 Am. & Eng. Enc. Law, 251; *Fay v. Valentine*, 12 Pick. 40, 22 Am. Dec. 397; *Morris v. Beecher*, 1 N. D. 130, 45 N. W. 697; 16 Cyc. 770, 773; *Barkworth v. Isbell*, 101 Mich. 40, 59 N. W. 408; *Kirk v. Hamilton*, 102 U. S. 68, 26 L. ed. 79; *Sutton v. Consolidated Apex Min. Co.* 14 S. D. 33, 84 N. W. 213; *Dickerson v. Colgrove*, 100 U. S. 578, 25 L. ed. 618; *Tolerton & S. Co. v. Casperson*, 7 S. D. 206, 63 N. W. 908.

Dickson & Devaney, for respondents.

The redemption statutes, and the statutes defining "redemptioners" and prescribing their rights and their duties should they seek to protect these rights, are plain and clear. *Comp. Laws 1913*, §§ 7754, 7755, 8085 to chap. 12 of the Code of Civil Procedure; *State ex rel. Brooks Bros. v. O'Connor*, 6 N. D. 285, 69 N. W. 692.

A senior lien holder may redeem from a redemption made by a junior lien holder, by paying the amount of the first redemption, with interest, and taxes paid, if any. *State ex rel. Brooks Bros. v. O'Connor*, 6 N. D. 289, 69 N. W. 692; *North Dakota Horse & Cattle Co. v. Serumgard*, 17 N. D. 466, 29 L.R.A.(N.S.) 508, 138 Am. St. Rep. 717, 117 N. W. 453.

The duty of giving notice of other or subsequent liens is cast upon a "redemptioneer," and not upon a "certificate of sale holder." There is no estoppel in this case. *Comp. Laws 1913, § 7756*; *O'Leary v. Schoenfeld*, 30 N. D. 374, 152 N. W. 679.

BRUCE, J. This action was brought by the Bank of Mowbray against the defendant Kelland as sheriff and Allert and Winter as individuals and copartners for the purpose of requiring the sheriff to issue to the bank a sheriff's deed upon its redemption of the land described in the complaint. A demurrer to the complaint was sustained by the district court, and from the order sustaining this demurrer, this appeal was taken.

The main question is whether the owners of a second and third mortgage who have not attempted to redeem from the foreclosure of the first mortgage during the year of redemption which is allowed to the mortgagor and first redemptioner under the provisions of § 8085, *Compiled Laws of 1913*, may after the expiration of such year, but within sixty days of redemption by a fourth mortgagee, which is made during such year, redeem from the redemption of such fourth mortgagee, and if so whether they will merely be required to pay the amount that has already been paid by the fourth mortgagee in order to effect his redemption, with interest and taxes and assessments paid by such mortgagee with interest, or in addition thereto the amount of his mortgage lien. Do they, in short, by failing to themselves redeem during the year and by allowing the fourth mortgagee so to do, waive by such delay the lien of their mortgages and their consequent right of redemption, or, if allowed to redeem at all, are they merely allowed so to do on condition that they surrender their places as prior encumbrancers, and pay not only the amount due on the original foreclosure sale, but on the lien of the redemptioner and subsequent encumbrancer from whom they redeem?

We are of the opinion that such second and third mortgagees may redeem within sixty days of the last redemption, and that all they need do is to pay the amount which was paid by the holder of the fourth mortgage in order to effect his redemption with interest thereon, and taxes and assessments and interest thereon which were paid by such fourth mortgagee after his redemption. The statute, to our minds, is too clear to need interpretation. It speaks for itself, and is as follows:

"Section 7755 [Comp. Laws 1913]. If the property is so redeemed by a redemptioner, another redemptioner may, even after the expiration of one year from the day of sale, redeem from such last redemptioner; provided, the redemption is made within sixty days after such last redemption. This sixty-day limitation does not apply to any redemption made within one year after the sale by whomsoever or from whomsoever such redemption is made; but all persons entitled to redeem shall in all cases have the entire period of one year from the day of sale in which to redeem. A redemptioner in redeeming from another redemptioner must pay the sum paid on such last redemption with like interest thereon in addition as provided by the preceding section and the amount of any assessment or taxes which the last redemptioner may have paid thereon after the redemption by him with like interest on such amount and, in addition, *the amount of any liens held by said last redemptioner prior to his own with interest*; but the judgment on which the property was sold need not be so paid as a lien. The property may be again, and as often as a redemptioner is so disposed, redeemed from any previous redemptioner within sixty days after the last redemption on paying the sum paid on the last previous redemption with interest at the same rate as provided for the first redemption in § 7754 in addition and the amount of any assessment or taxes which the last previous redemptioner paid after the redemption by him with like interest thereon and the amount of any liens, other than the judgment under which the property was sold, held by the last redemptioner *previous to his own*, with interest."

The next point urged is that the partnership of Allert & Winter is estopped from asserting its second and third mortgages for the reason that one of the members thereof, Winter, had obtained an assignment of the sheriff's certificate of sale which was issued on the foreclosure of

the first mortgage. We cannot see, however, how this fact could operate either as a waiver or estoppel or as a proof of laches. The firm had the right to redeem from any redemption that was made and within sixty days thereafter. There was no waiver by the partnership, and no laches, for the statute had itself stated the time in which the partnership could act. There was no estoppel, for not only had the partnership done nothing to estop it, but no loss or injury is shown to have accrued to the plaintiff, the fourth mortgagee. It is true that the latter paid out its money in order to redeem from the first mortgage, but it is entitled to the repayment of that money with interest thereon, and in contemplation of the law this will fully compensate it for the loss of its use.

Nor is there any merit in the further objections that the mortgagees, Allert & Winter, should be estopped because at the time of the redemption by the plaintiff, the Bank of Mowbray, neither the assignment of the sheriff's certificate of sale on the foreclosure of the first mortgage nor the assignment to them of one of the mortgages had been recorded. There was no estoppel simply because there was no injury or loss. The plaintiff, the Bank of Mowbray, the holder of the fourth and inferior lien, knew of the existence of these two superior liens, as both were recorded. It must have been immaterial to it to whom the instruments were afterwards assigned, if to anybody. It knew that within sixty days after its redemption the owners of those liens, whoever they were, could redeem. It was absolutely immaterial who those owners were.

Nor is there any merit in the contention that a court of equity should give relief to the plaintiff, the Bank of Mowbray, as against the defendants Allert & Winter, on equitable principles alone and irrespective of the statute. The mortgage of the Bank of Mowbray was a fourth mortgage, and only amounted to \$506.56 and interest. The total indebtedness on the first three mortgages amounted to \$8,248.34, with interest, and of this amount \$3,045.13, with interest, was represented by the mortgages of Allert & Winter. The value of the land was placed at \$8,000. The value of the equity of the fourth mortgagee therefore amounted in fact to nothing, and yet in spite of the statute the plaintiff seeks to have this court give it a preference and a value.

The judgment of the District Court is affirmed.

**JAMES ELTON v. J. M. LAMB, as Administrator of the Estate of
A. J. Felder, Deceased.**

(157 N. W. 288.)

Probate court — order — settling administrator's account.

1. An appeal lies by a creditor or claimant from an order of the probate court settling an administrator's account.

Funeral expenses — decedent — administration expenses — first paid — order of preference — claims against estate.

2. Funeral and burial expenses of a decedent are a charge against his estate that must be paid next in order of preference to administration expenses, and its payment cannot be disallowed, neglected, or refused by the administrator because the funds of the estate have been used in payment of claims subordinate thereto in the order of preference declared by § 8755, Comp. Laws 1913.

Funeral charges — suit to recover — nonpreferred claim included — judgment — full amount — preference in rank of payment — not lost — judgment — order for — amounts stated separately therein.

3. Where to enforce payment of funeral charges it was necessary to sue on them, and with which another cause of action upon a nonpreferred claim was joined, and a judgment was procured and entered for the aggregate amount of both claims, the preference in rank of payment in favor of the funeral charges is not lost, and preference is to be given to that portion of the judgment based upon the cause of action for funeral expenses, where the order for judgment separately stated the amounts due upon each cause of action. It was the duty of the administrator to disclose, and the probate court to ascertain, nonpayment of the charge for funeral expenses.

Claims — not filed — payment of — exception taken — sustained — disbursements — administrator — liability of.

4. Exception taken to the payment made of a \$36 item of indebtedness owing by decedent, and for which no claim had been filed with the administrator is also sustained. Exceptions to all other items overruled, except that all disbursements other than for administration expenses are subordinate in rank as to preference to said funeral charges, and payment of them without payment

Note.—That funeral expenses are to be given a preference over other claims against a decedent's estate at common law and under most statutes is the rule as set forth in notes in 33 L.R.A. 665; 28 L.R.A.(N.S.) 572; and 52 L.R.A.(N.S.) 1153.

On liability of decedent's estate for funeral expenses, see also note in 9 Am. Dec. 652.

of the funeral charges renders the administrator liable for the latter if the estate is wholly disbursed.

District court — judgment — directed to be entered — probate court — costs — probate — appeal.

5. District court will direct judgment to be entered in probate court accordingly, vacating the order settling the final account of the administrator and ordering payment by the administrator of the charge for funeral expenses and costs of probate, district court and appeal costs.

Opinion filed March 15, 1916.

From an order of the District Court, *Cooley, J.*, affirming final accounting in the Probate Court of Nelson County, plaintiff, a claimant, appeals.

Reversed.

Theodore B. Elton, for appellant.

It is the duty of the court to carefully scrutinize an account presented for settlement, and to reject any improper items therefrom, whether or not exceptions are interposed. *Re Willey*, 140 Cal. 238, 73 Pac. 998; *Re Sanderson*, 74 Cal. 202, 15 Pac. 753; *Re Spanier*, 120 Cal. 701, 53 Pac. 357; *Re More*, 121 Cal. 639, 54 Pac. 148; *Re Franklin*, 133 Cal. 587, 65 Pac. 1081.

When a credit is claimed by a personal representative and its validity is disputed, the law casts upon him the burden of supporting it, and he must not only prove the payment, but also the correctness of the demand. 18 Cyc. 1181; *Jenks v. Terrell*, 73 Ala. 238; *Harwood v. Pearson*, 60 Ala. 410; *Pearson v. Darrington*, 32 Ala. 227; *Gaunt v. Tucker*, 18 Ala. 27; *Wysong v. Nealis*, 13 Ind. App. 165, 41 N. E. 388; *Re Eacott*, 95 Me. 522, 50 Atl. 708; *Brewster v. Demarest*, 48 N. J. Eq. 559, 23 Atl. 271.

The requirements of the statute are peremptory that vouchers shall be filed for all claims. Comp. Laws 1913, §§ 8831, 8832; *Re Wicke*, 74 App. Div. 221, 77 N. Y. Supp. 558; *Jenks v. Terrell*, 73 Ala. 238; *Wright v. Wright*, 64 Ala. 88; *Gaunt v. Tucker*, 18 Ala. 27; *Savage v. Benham*, 11 Ala. 49; *State ex rel. Dales v. Moore*, 36 Neb. 579, 54 N. W. 866; *Moore v. Garneau*, 39 Neb. 511, 58 N. W. 179; *People ex rel. Brinkerhoff v. Swigert*, 107 Ill. 495.

Any item in excess of the amount stated by statute cannot be allowed

except upon proper voucher, and the testimony of the administrator alone is not sufficient to support a payment or allowance made contrary to the statute. Comp. Laws 1913, § 8832.

Claims not proved and presented for allowance within the time limited are barred, and cannot be allowed. Comp. Laws 1913, §§ 8734, 8736, 8739-8743.

The general rule is that a personal representative cannot waive the requirements of the statute, and if he pays a claim not properly presented, he is not entitled to credit therefor. 18 Cyc. 500; *Nichols v. Shearon*, 49 Ark. 75, 4 S. W. 167; *Bunnell v. Post*, 25 Minn. 376; *Huebner v. Sesseman*, 38 Neb. 78, 56 N. W. 697; *Johnson v. Pulver*, 1 Neb. (Unof.) 290, 95 N. W. 697; *Gilman v. Maxwell*, 79 Minn. 377, 82 N. W. 669; *Miner v. Raymond*, 113 Mich. 28, 71 N. W. 501; *Langston v. Canterbury*, 173 Mo. 122, 73 S. W. 151; *Springfield Grocer Co. v. Walton*, 95 Mo. App. 526, 69 S. W. 477.

If funds were needed to pay debts or expenses, the administrator should have petitioned, in proper form, for authority to raise such funds, either by sale or mortgage. Comp. Laws 1913, §§ 8764 et seq., 8790, 8791.

An allowance to a widow, as such, must be made by an order of the county court. Comp. Laws 1913, §§ 8581, 8727; 18 Cyc. 401, 402; *Re Lux*, 100 Cal. 606, 616, 35 Pac. 345, 639.

The administrator must not only show the payment and correctness of any allowance to the widow, but it must also affirmatively appear of record that the widow was the lawful wife of the deceased at the time of his death, and that the allowance was necessary. *Auerbach v. Pritchett*, 58 Ala. 451; *Veile v. Koch*, 27 Ill. 129; *Shannon v. White*, 109 Mass. 146; *Smith v. Howard*, 86 Me. 203, 41 Am. St. Rep. 537, 29 Atl. 1008; *Richardson v. Lewis*, 21 Mo. App. 531; *Austin's Estate*, 73 Mo. App. 61; *Graham v. Stull*, 92 Tenn. 673, 21 L.R.A. 241, 22 S. W. 738; *Hascall v. Hafford*, 107 Tenn. 355, 89 Am. St. Rep. 952, 65 S. W. 423; *Alston v. Ulman*, 39 Tex. 158; *Mitchell v. Word*, 64 Ga. 208; *Medley v. Dunlap*, 90 N. C. 527; *Barber v. Ellis*, 68 Miss. 172, 8 So. 390; *Note to Jones v. Layne*, 11 L.R.A.(N.S.) 361; Comp. Laws 1913, § 8727; 18 Cyc. 394, and cases cited.

An advancement to be taken out of her distributive share is unauthorized because distribution can only be made upon final account. Comp.

Laws 1913, § 8759; *Re Willey*, 140 Cal. 238, 73 Pac. 998; *Re Rose*, 80 Cal. 180, 22 Pac. 86; *Re Miner*, 46 Cal. 572; *Barton's Estate*, 55 Cal. 90; *Re Simmons*, 43 Cal. 549; *Re Ricaud*, 70 Cal. 71, 11 Pac. 471; *Re Levinson*, 108 Cal. 450, 41 Pac. 483; *Re Carter*, 132 Cal. 113, 64 Pac. 123.

The claim under the mortgage should have been duly verified and presented to the administrator as required. *Comp. Laws 1913*, §§ 8737, 8741, 8753, 8757, 8759; *Knutsen v. Krook*, 111 Minn. 352, 127 N. W. 13, and cases cited, 20 Ann. Cas. 852.

The existence of liens and mortgages in no wise exempts the holders from duly presenting their claims. *Comp. Laws 1913*, §§ 8734, 8736, 8737, 8739-8743, 8753, 8757, 8759; *Re Turner*, 128 Cal. 388, 60 Pac. 967; *Code Civ. Proc.* § 1569.

A canceled check given in payment of a claim for which no voucher was made is wholly insufficient as a voucher, and proves nothing. *Jenks v. Terrell*, 73 Ala. 238; Cases cited upon Exception No. 1 herein.

A voucher filed, but not in form and failing to show for what the payment was made, and the supposed debt paid not having been presented by proper claim, is insufficient, and the same should be disallowed. *Jenks v. Terrell*, 73 Ala. 238.

The appellant here is a creditor of a higher class than those known as common or ordinary creditors. The appellant's claim was and is of higher rank, a preferred claim. The judgment roll in connection with this claim was admissible in evidence. *Comp. Laws 1913*, § 8745; 18 Cyc. 562; *McLean v. Crow*, 88 Cal. 644, 26 Pac. 596; *Porter v. Sweeney*, 61 Tex. 213; *Williams v. Robinson*, 56 Tex. 347; *Tucker v. Yell*, 25 Ark. 420; *McCall v. Lee*, 120 Ill. 261, 11 N. E. 522.

Whether the claim is allowed by the administrator or established by judgment after disallowance, the rank or class to which it belongs still remains a matter to be determined by the county court. *McLean v. Crow*, 88 Cal. 644, 26 Pac. 596; *Code Civ. Proc.* § 1646; *Re Willey*, 138 Cal. 301, 71 Pac. 441; *Morton v. Adams*, 124 Cal. 229, 71 Am. St. Rep. 53, 56 Pac. 1038; *Re Smith*, 122 Cal. 462, 55 Pac. 249.

The judgment roll was competent as establishing the disallowed claim, and, the record being the sole embodiment of the judicial utterances, no other oral or written matters can be set up in competition with

it. The record is conclusive. 2 Wigmore, Ev. § 1346; 2 Black, Judgm. §§ 625, 626; 7 Enc. Ev. 795, 797, 798, 852; 10 Enc. Ev. 757.

The complaint is properly admissible in evidence as part of the record, because no answer thereto was ever made, and therefore its averments were and must be taken as true. 23 Cyc. 752, and cases cited; Last Chance Min. Co. v. Tyler Min. Co. 157 U. S. 683, 39 L. ed. 859, 15 Sup. Ct. Rep. 733, 18 Mor. Min. Rep. 205; Re More, 121 Cal. 639, 54 Pac. 148; 23 Cyc. 1055, and cases cited; Martinson v. Marzolf, 14 N. D. 308, 103 N. W. 937; Borden v. McNamara, 20 N. D. 237, 127 N. W. 104, Ann. Cas. 1912C, 841; Mach v. Blanchard, 15 S. D. 432, 58 L.R.A. 811, 91 Am. St. Rep. 698, 90 N. W. 1042; Re Willey, 138 Cal. 301, 71 Pac. 441; Morton v. Adams, 124 Cal. 229, 71 Am. St. Rep. 53, 56 Pac. 1038.

The provisions of the local statute fixing the order of payment are mandatory; they cannot be changed or disregarded by the court or by the representative. 18 Cyc. 546; Tompkins v. Weeks, 26 Cal. 51; Lawrence v. Leake & W. Orphan House, 2 Denio, 577, 11 Paige, 80; Bloodgood v. Bruen, 8 N. Y. 362; Voorhis v. Childs, 17 N. Y. 357; Colton v. Field, 131 Ill. 398, 22 N. E. 545; Dullard v. Hardy, 47 Mo. 403; Schoeneich v. Reed, 8 Mo. App. 356; Jenkins v. Jenkins, 63 Ind. 120; 18 Cyc. 546.

Without an order of the court, the administrator pays debts or claims at his peril. Re Fernandez, 119 Cal. 579, 51 Pac. 851.

Allowance to the family is expressly made subject and subsequent to a claim for funeral expenses. In fact, the authorities hold that such a claim need not be presented to the administrator for allowance. Comp. Laws 1913, §§ 8725, 8728, 8738; Potter v. Lewin, 123 Cal. 146, 55 Pac. 783; Dampier v. St. Paul Trust Co. 46 Minn. 526, 49 N. W. 286; Benedict v. Ferguson, 15 App. Div. 96, 44 N. Y. Supp. 307; Sawyer v. Hebard, 58 Vt. 375, 3 Atl. 529, 18 Cyc. 455; 3 Sutherland, Code Pl. § 3331.

The administrator or county judge cannot exercise an arbitrary discretion in passing upon affidavits accompanying claims of creditors presented for allowance. Cullerton v. Mead, 22 Cal. 96; Pacific States Sav. Loan & Bldg. Co. v. Fox, 25 Nev. 229, 59 Pac. 4; Melton v. Martin, 28 Mont. 150, 72 Pac. 414.

Frich & Kelly, for respondent.

An order allowing a final account, in county court, not being a final adjudication, is not appealable. 18 Cyc. 1207, and cases cited in note 36; 2 Woerner, Am. Law of Administration, § 545; 19 Enc. Pl. & Pr. title, Settlement of Decedent's Estates, 1077, and cases cited.

The evidence of the administrator with reference to the remaining payments to which reference is made by appellant was received without objection; it shows that the items were actually paid by the administrator; that the expenditures were necessary to carry on the affairs of the estate, and is not contradicted. Therefore, the items are sufficiently vouched. *Re Hilliard*, 83 Cal. 423, 23 Pac. 393; *John v. Sharp*, 148 Ala. 665, 41 So. 635; *Terrell v. Rowland*, 86 Ky. 67, 4 S. W. 825; *Re Pollock*, 3 Redf. 100; *Re Nichols*, 4 Redf. 288.

The law recognizes the right of the administrator to receive credit for debts of the deceased justly due when paid, without a formal claim, presented and allowed. *Re Wonn*, 80 Iowa, 750, 45 N. W. 1063; *Re Pennock*, 122 Iowa, 622, 98 N. W. 480; *Lockhart v. White*, 18 Tex. 107; *Roberts v. Rogers*, 28 Miss. 154, 61 Am. Dec. 542; *Judson v. Bennett*, 233 Mo. 607, 136 S. W. 681; *Parks v. McDaniel*, 75 S. C. 7, 117 Am. St. Rep. 878, 54 S. E. 801; *Re Baruth*, 62 Misc. 596, 116 N. Y. Supp. 1125; *Re Bottoms*, 156 Cal. 129, 103 Pac. 849.

Insurance necessarily paid to protect the property and secure the same against loss is proper, and credit should be given therefor. *Taylor v. Bush*, 75 Ala. 432; 1 Ross, Prob. Law, pp. 439 et seq. §§ 304, et seq. and cases cited; *Enscoe v. Fletcher*, 1 Cal. App. 659, 82 Pac. 1075; *Re Nicholson*, 1 Nev. 518; 18 Cyc. 570.

It is the duty of the administrator during the course of administration to protect the property of the estate against waste or possible loss. *King v. Miller*, 99 N. C. 583, 6 S. E. 660; *Dills v. Hampton*, 92 N. C. 565; *Clemence v. Steere*, 1 R. I. 272, 53 Am. Dec. 621.

Where the administrator pays for necessary things, like insurance, if it is not a loan to the estate, then it must be provable as an expense. 18 Cyc. 242, and cases cited; *Lawton v. Fish*, 51 Ga. 647; *Burgess v. Green*, 70 Ky. 263; *Huson v. Wallace*, 1 Rich. Eq. 1; *Gee v. Hicks*, Rich. Eq. Cas. 5; *Reinstein v. Smith*, 65 Tex. 247.

For general improvement upon the real property, needed and necessary for its preservation during the administration, the representative has a right to credit. 1 Ross, Prob. Law, § 305; *Re Clos*, 110 Cal. 494,

42 Pac. 971; *Re Freund*, 131 Cal. 667, 82 Am. St. Rep. 407, 63 Pac. 1080; *Re Moore*, 72 Cal. 342, 13 Pac. 880.

The county court has the right to order the payment of an allowance out of the estate in such sum as may be necessary for the maintenance of the family, and the law accords such allowances priority of payment over all other charges, except funeral expenses and those of administration. *Comp. Laws 1913*, §§ 8727, 8728; *Jones v. Cooner*, 142 Ga. 127, 82 S. E. 445; *Jones v. Layne*, 144 N. C. 600, 11 L.R.A.(N.S.) 361, 57 S. E. 372; *Griesemer v. Boyer*, 13 Wash. 171, 43 Pac. 17; *Duplain's Succession*, 113 La. 786, 37 So. 755; *Banse v. Muhne*, 13 Ohio C. C. 501, 7 Ohio C. D. 224; 1 *Church*, *Prob. Law*, 569, 578; *Crenshaw v. Moore*, 124 Tenn. 528, 34 L.R.A.(N.S.) 1161, 137 S. W. 924, *Ann. Cas. 1913A*, 165; *Crew v. Pratt*, 119 Cal. 131, 51 Pac. 44; *Re Lux*, 100 Cal. 606, 35 Pac. 345; *Re Lux*, 114 Cal. 89, 45 Pac. 1028; *Re Dougherty*, 34 Mont. 336, 86 Pac. 38; 18 *Cyc.* 397; *Woerner*, *Am. Law of Administration*, § 92; 1 *Ross*, *Prob. Law*, 485, 489, note 2; *Dickinson v. Henderson*, 122 Mich. 583, 81 N. W. 583; *West v. Newell*, 149 Mass. 520, 21 N. E. 954; *Sawyer v. Sawyer*, 28 Vt. 248; *Simmons v. Byrd*, 49 Ga. 288.

Under our system of administration of estates, no claim is required to establish a liability for expenses of administration, and no order is necessary for the payment thereof. The statute authorizes the administrator or representative to "retain" in his hands the necessary amount to pay or reimburse him. *Comp. Laws 1913*, § 8759; *Re Ricker*, 14 Mont. 153, 29 L.R.A. 622, 35 Pac. 960; *Stewart's Appeal*, 110 Pa. 410, 6 Atl. 321; *Re Mason*, 98 N. Y. 527; *Re Stratton*, 46 Md. 551.

The power to sell real estate in probate proceedings is a limited one, and will not be extended beyond the express provisions of the statute. 2 *Woerner*, *Am. Law of Administration*, § 481; *Kolars v. Brown*, 108 Minn. 60, 133 Am. St. Rep. 410, 121 N. W. 229; 18 *Cyc.* 841, and cases cited; 22 *Century Dig.* title Ex. & Ad. § 1611; *Ball v. Green*, 90 Ind. 75; *Coombs v. Jordan*, 3 Bland, Ch. 284, 22 Am. Dec. 236; *Sears v. Mack*, 2 Bradf. 394; *Sloan v. Mendenhall*, 60 N. C. (Winst. Eq.) 1; *Barnett v. Thomas*, 36 Ind. App. 441, 114 Am. St. Rep. 385, 75 N. E. 868.

Administrator has power to compromise claims when to so do is in the interest of the estate. 18 *Cyc.* 226; *Re Ricker*, 14 Mont. 153, 29 L.R.A.

622, 35 Pac. 960; *Moulton v. Holmes*, 57 Cal. 337; 1 Ross, Prob. Law, 441, and cases cited; *Whithed v. St. Anthony & D. Elevator Co.* 9 N. D. 224, 50 L.R.A. 254, 81 Am. St. Rep. 562, 83 N. W. 238; *Martin v. Royer*, 19 N. D. 504, 125 N. W. 1027.

The debt in question was not barred by failure to present it. *Russell v. Wheeler*, 129 Mich. 41, 88 N. W. 73; *Tayloe v. Bush*, 75 Ala. 432; 18 Cyc. 285, 286, and cases cited.

A joint demurrer interposed to two or more causes of action will be overruled if any one cause is good. 6 Enc. Pl. & Pr. 305-321, and cases cited; 22 Century Dig. Ex. & Ad. § 2164.

The allowance of a claim by an administrator does not establish its rank, nor does the establishing of the claim in court have that effect. The county court has exclusive jurisdiction for settling estates. *McLean v. Crow*, 88 Cal. 644, 26 Pac. 596; *Re Turner*, 128 Cal. 388, 60 Pac. 967.

Goss, J. This is an appeal from an order of the district court of Nelson county disallowing exceptions to an accounting previously overruled in probate court. Letters of administration were issued to J. M. Lamb in October, 1908, upon the estate of Anthony F. Felder. Administrator farmed the lands in 1909, and also finished farming operations previously conducted by him as agent of the deceased in 1908. The lands were sold in 1910 except a residence property apparently remaining unsold. No administrator's accounting was ever had until one was filed in October, 1911. In July, 1911, plaintiff had procured a judgment in district court against said administrator in his representative capacity upon two causes of action, which judgment, with costs, aggregated \$360.79. One of the causes of action included in the complaint was in the sum of \$139 for funeral and burial expenses of the deceased Felder. Judgment was awarded on demurrer, the order for judgment directing judgment for said amount, with interest, together with an amount found due upon the second cause of action. A judgment in the lump amount of \$360.79 was entered inclusive of both causes of action. Both judgment and order therefor directed payment by the administrator "in due course of administration," and were filed forthwith in the probate court. Plaintiff appeared at the hearing of the administrator's account, no part of the judgment having been paid, and interposed ob-

jections to the allowance of the administrator's account, and in all fifteen exceptions thereto. It is unnecessary to discuss any of these except the last one taken, which challenges the payments made by the administrator of any items shown in his account to have been paid without first payment of the items placed in judgment, and alleging that the personal representative had disregarded the statute granting the claims sued on, or the one for funeral and burial expenses, preference over all other items of disbursement shown to have been made on the account, excepting solely expenses of administration. As this exception is well taken, it disposes of the necessity of a discussion of many assignments taken specifically to the particular payments or disbursements made by the administrator.

The portion of the judgment against the administrator for funeral expense is a charge against the estate the same as the expense of administration, and under the express terms of § 8755, Comp. Laws 1913, must be paid next after necessary expense of administration. It is a preferred charge to be paid in preference to all debts of the decedent, whether secured or unsecured. The administrator's account discloses that over and above the cropping expenses, which are expenses of administration under the circumstances of this case, there were many disbursements made by the administrator in the payment of debts secured and unsecured of the decedent amounting to several times the funeral expenses. To this extent the administrator has misapplied the funds of the estate. For this he is responsible, as he had paid these claims without any prior court order establishing the order of preference, and subsequently presented his accounting disclosing such erroneous misapplication of the proceeds of the estate. Beyond all doubt he acted in good faith, and had probably at first assumed that the funeral expenses incurred at Washington, District of Columbia, had been paid by the relatives. But under his own testimony he afterward had notice to the contrary, and that the funeral charges remained unpaid in 1910, as on the 13th of December of that year a formal claim was filed with him, while prior to that time the claim had been refused or its payment neglected, and it had been in the hands of others for collection. In fact the administrator testifies that, while he doesn't remember the date of its first presentation, that "it might have been right after" his appointment. "I don't know just exactly what the date was. I know he wrote me. I met him

(party having it for collection) on the street and was talking to him about it." "I think he sent me statements with a letter." "One of these claims was a claim for funeral expenses." As this was a charge against the estate it did not need to be filed as a claim against it, other than to be presented for payment in due course. The administrator could not ignore or disallow it, and by disbursing the estate otherwise leave it unpaid, secure an approval of his accounting, and escape liability, where the claimant as here presents the claim at or before the accounting, and insists upon disallowance of the accounting as made and the payment of the preferred charge. This could not be done any more than could the personal representative refuse to pay necessary expenses of administration and seek to avoid liability for them in his final accounting.

But respondent contends that by merging the claim in judgment with another by the taking of a judgment for the lump sum, priority of payment of the charge as funeral expenses is waived, and that the court must regard the entire judgment as an ordinary demand against the state and payable as such as a claim subordinate to all those for which the estate's funds have been distributed. But with the judgment there was filed in county court the order for judgment granting judgment upon the first cause of action in the amount therein set forth in the suit brought against the administrator, and which cause of action set forth the facts upon which it was based, and that the charge was for no other than funeral and burial expenses. This order for judgment was entered upon the administrator's demurrer admitting such to be the facts. He was directed to "pay the plaintiff in due course of administration the sum of \$139, together with interest on it at 7 per cent per annum from the 5th day of September, 1908, and the further sum of \$150.90, with interest thereon at the rate of 7 per cent per annum from the 19th day of June, 1908, together with costs and disbursements of this action." The administrator well knew of what the first item of \$139 consisted, and likewise the probate court must have known that it was for funeral expenses, and that to comply with the order of the district court the funeral expenses should be paid "in due course of administration." To do this it must be paid in order of preference next after the necessary expenses of administration of the estate. And although the exceptions taken to the account, numerous though they are, and unneces-

sarily so, are not specific in claiming a preference for this claim for funeral expenses over the other claims paid, yet it is plain that the administrator knew of the nature of the claim, and that it was his duty in accounting, even without exceptions requiring it, to disclose that it had not been paid. It was likewise the probate court's duty to ascertain whether funeral expenses had been paid, and, if not, why not. Even if it be assumed that appellant was wrongfully trying to obtain a preferential payment of the entire amount of the judgment, only approximately one half of which was preferred as for funeral expenses, nevertheless it was the duty of the administrator and the probate court to separate the items and classify them as to priority, and so obey the order of the district court that they be paid in "due course of administration" according to priority.

None of the other fourteen assignments, based upon that many exceptions to the account, are allowed, excepting No. 2, which was not a preferred claim, but one of the lowest grade, as was the balance over funeral expenses of this judgment. All other exceptions to the account are overruled without further discussion.

One further question deserves mention. The respondent in district court moved "to dismiss the appeal (from the county court) on the ground that the appellant as a creditor is not a party to the proceeding in county court, and is not a party in interest as defined by the statutes, and not entitled to appeal from the order allowing the annual report, and that an order allowing an annual report of an administrator made by a county court is not an appealable order." Taking these in order, the appellant even as a creditor of the estate so far as an administrator's accounting is concerned is a party interested in the estate. The approval of the account establishes its validity as against the claim asserted, and the only remedy of this judgment creditor is by appeal. The district court, having but appellate jurisdiction, is devoid of authority to rank or classify the claim, or otherwise, except on appeal, disturb the accounting as settled by the order of the probate court. The parties were in probate court upon a hearing called for the very purpose, not only as between the heirs and those who would share in a division of the assets of the estate, but inclusive of creditors of all classes. This is discussed and settled in *Johnson v. Rutherford*, 28 N. D. 87, 147 N. W. 390. Subdivision 11 of the syllabus in that case reads: "Probate procedure

contemplates that claims allowed by the administrator and the county court shall not be fully litigated on presentation for such allowance, but the validity of a claim so allowed may be tried on the hearing to be had on the personal representative's accounting or upon his application to sell property had on notice, from any of which an appeal from the judgment passed by the probate court may be taken on the items of the account thus litigated to the district court and there retried. An appeal is also allowed from a claim established in county court by the confirmation of the report of a referee appointed by consent and from which an appeal to the district court may be taken. The district court on such appeal acts as an appellate tribunal, with judgment to be entered under its order in the probate court." But respondent would distinguish as does some authorities between whether the order is one settling a final account or an annual account of an administrator. Under our practice this distinction is without merit. Our probate statutes are taken almost literally from California, as a comparison with those of that state will disclose, and as has been held in the case above cited. The recent work of Church on Probate Law & Practice, a California text-book largely upon the statutes of that state, has the following at page 1238 under the heading "Appealable Orders:" "An order settling the final account of an executor or administrator is appealable. *Re Coutts*, 87 Cal. 480-482, 25 Pac. 685. An interlocutory order settling the account of an administrator, but not discharging him from his trust, is not a final judgment, but such order is appealable. *Re Rose*, 80 Cal. 166-170, 22 Pac. 86; *Re Sanderson*, 74 Cal. 199, 15 Pac. 753. . . . There is no distinction between orders settling accounts as to their appealability. An order settling an account is appealable whether it be a final or any other account. *Re Grant*, 131 Cal. 426-429, 63 Pac. 731." And such is the contemplation of our statutes. Although § 8513, subdiv. 5, excepts a creditor from what is usually meant by the phrase "person interested" "except where a different signification is apparent from the context," it can have no application to hearings had upon accounts concerning the ranking of creditors for sharing in the estate and accounting, allowing or disallowing it. Respondent's contention would also bar a creditor from a hearing upon a final accounting called pursuant to §§ 8834-8836 if a creditor is not a "person interested," because excluded by § 8513. A creditor is a person interested in the estate and entitled

to participate in and litigate the account, whether it be annual or final; and whenever so litigating a trial is had it is had in the court of original jurisdiction to determine such issues; and except when otherwise provided by statute it is conclusive, unless appealed from.

This passes upon all questions necessary except concerning costs. It was necessary for plaintiff to sue the administrator to establish the right to payment of a preferred claim, a charge against the estate for funeral expenses. He is entitled to the costs of this litigation, with the amount of funeral expenses and interest thereon, together with his necessary expense and disbursements at the hearing of the administrator's account, together with his taxable costs on this appeal. The district court will tax costs in plaintiff's favor accordingly for the trial had in that court, together with the plaintiff's appeal costs, and enter judgment therefor, and order also that the probate court disallowed said accounting and set aside its order of confirmation thereof, and that it require the administrator to pay the funeral charges and costs of collection aforesaid, and that such further proceedings may be had in probate court as are provided by law.

WILLIAM KURTZ v. C. W. PAULSON.

(157 N. W. 305.)

Amendments to pleadings — during trial — trial courts — wide discretion in.

1. Trial courts are vested with wide discretionary powers in the matter of granting amendments to pleadings during the trial of an action.

Evidence — chattel mortgage — objections — excluding — error.

2. It is *held* that, for reasons stated in the opinion, the court erred in excluding a certain chattel mortgage offered in evidence by the defendant.

Opinion filed March 16, 1916.

From a judgment of the District Court of Barnes County, *Coffey, J.*, defendant appeals.

Reversed.

A. P. Paulson, for appellant.

While a wide discretion is vested in the trial court in the matter of the amendment of pleadings during the trial, or at any time prior or after, yet an amendment should not be allowed to make the pleading correspond to the proof, where the proof itself clearly shows a contradictory state. In other words, the evidence, on the points sought to be covered by the amendment, was conflicting, and therefore nothing existed upon which to base such amendment. *French v. State Farmers' Mut. Hail Ins. Co.* 29 N. D. 426, L.R.A.1915D, 766, 151 N. W. 7; *Barker v. More*, 18 N. D. 82, 118 N. W. 823; *Dickson v. Pritchard*, 111 Wis. 310, 87 N. W. 292; *Rogers v. Union Stone Co.* 130 Mass. 581, 39 Am. Rep. 478; 30 Century Dig. ¶ 606 (k); *Guerin v. St. Paul F. & M. Ins. Co.* 44 Minn. 20, 46 N. W. 138.

Furthermore, the evidence tending to establish any greater sum due than that originally stated was incompetent and inadmissible. *Woodward v. Northern P. R. Co.* 16 N. D. 38, 111 N. W. 627.

Again, the amended complaint did not conform to the proof. *Nash v. Southern R. Co.* 136 Ala. 177, 96 Am. St. Rep. 19, 33 So. 932; *Beavers v. Hardie*, 59 Ala. 570; *Murphy v. Plankinton Bank*, 18 S. D. 317, 100 N. W. 617.

An amendment which simply supplies some formal matter which does not go to the merits may be allowed at any seasonable time, but one which substantially changes the cause or defense, during trial, should not be allowed. *Ashe v. Beasley*, 6 N. D. 191, 69 N. W. 188.

Exclusion of proper evidence is ground for a new trial. That there was other evidence of the same kind, or that the rejected evidence was cumulative where the other evidence in the case is conflicting, may not render the error harmless. 29 Cyc. 783, ¶ b, and cases cited; *Moon v. Hawks*, 2 Aik. 390, 16 Am. Dec. 725; *Jones v. Young*, 18 N. C. (1 Dev. & B. L.) 352, 28 Am. Dec. 569; *Knifong v. Hendricks*, 2 Gratt. 212, 44 Am. Dec. 385; *Plymouth County Bank v. Gilman*, 4 S. D. 265, 46 Am. St. Rep. 786, 56 N. W. 892.

It is the law that the creditor cannot be compelled to accept the principal before maturity, even if the entire interest up to the date of maturity is tendered or paid. 22 Am. & Eng. Enc. Law, 530, ¶ 5, and cases cited.

Where the principal note and coupons had been executed with a fixed date of maturity, in the absence of special agreement to forego the

33 N. D.—26.

interest, defendant was entitled to collect the whole interest up to the date of maturity. *Skelly v. Bristol Sav. Bank*, 63 Conn. 83, 19 L.R.A. 599, 38 Am. St. Rep. 341, 26 Atl. 474; *Crosby v. Wyatt*, 10 N. H. 318; *Hubbard v. Callahan*, 42 Conn. 524, 19 Am. Rep. 564.

Where a borrower pays interest in advance under a contract, he cannot come in before the maturity of his note and compel the payee to accept payment and apply such advanced interest on the principal as a payment. *Drew v. Towle*, 30 N. H. 531, 64 Am. Dec. 315; *People's Bank v. Pearsons*, 30 Vt. 714; *Jarvis v. Hyatt*, 43 Ind. 163; *Abel v. Alexander*, 45 Ind. 523, 15 Am. Rep. 270.

Where the verdict is against the weight of the evidence, but the evidence is contradictory, a motion for a new trial should be granted. *Godfrey v. Godfrey*, 127 Wis. 47, 106 N. W. 814, 7 Ann. Cas. 176; *Montmorency County v. Putnam*, 144 Mich. 135, 107 N. W. 895; *Dart v. Russell*, 99 Minn. 364, 109 N. W. 702; *Lang v. Merbach*, 96 Minn. 431, 105 N. W. 415; *Racine v. Mahoney*, 106 Minn. 537, 118 N. W. 64; *Rochford v. Albaugh*, 16 S. D. 628, 94 N. W. 701; *Dickinson v. Hahn*, 23 S. D. 65, 119 N. W. 1034; *Nilson v. Horton*, 19 N. D. 187, 123 N. W. 397, and cases cited.

Winterer & Ritchie, for respondent.

The right to allow amendments to pleadings rests in the sound discretion of the trial court, nor will the trial court's action be reversed unless it clearly appears that such discretion has been abused. *French v. State Farmers' Mut. Hail Ins. Co.* 29 N. D. 426, L.R.A.1915D, 766, 151 N. W. 7; 1 Enc. Pl. & Pr. 586; Comp. Laws 1913, § 7482, and cases cited.

Where certain evidence is offered and objection is made, but same is admitted, such procedure affords no ground for legal objection to the allowance of an amendment. *Firebaugh v. Burbank*, 121 Cal. 186, 53 Pac. 560; *Guidery v. Green*, 95 Cal. 630, 30 Pac. 786; *Clark v. Phoenix Ins. Co.* 36 Cal. 168; *Stringer v. Davis*, 30 Cal. 318.

After the amendment was allowed and after the service of the amended complaint, the defendant continued to participate in the trial, and by proof attempted to meet the amended complaint; that is, attempted to show no such amount due. *City Light, Power, Ice & Storage Co. v. St. Mary's Mach. Co.* 170 Mo. App. 224, 156 S. W. 83; *Borkowski v. Janicke*, 170 Mo. App. 610, 157 S. W. 125.

In such case, the amendment was harmless, even though allowed and made erroneously. *Bishop v. Baisley*, 28 Or. 119, 41 Pac. 936; *Dickenson v. Columbus State Bank*, 71 Neb. 260, 98 N. W. 813; *Brown v. Brown*, 71 Neb. 200, 115 Am. St. Rep. 568, 98 N. W. 718, 8 Ann. Cas. 632.

CHRISTIANSON, J. The plaintiff was the owner of certain lands in Barnes county on which there was a first mortgage for \$3,800 in favor of the First National Bank of Tower City, and a second mortgage for \$3,000, in favor of the Merchant's State Bank of Fingal, of which latter bank the defendant Paulson was president. In the fall of 1908, the plaintiff was desirous of making a new loan, and negotiations were had between plaintiff and defendant with reference thereto. Plaintiff claims that defendant agreed to procure a first loan for \$6,000, the proceeds of which were to be applied in payment of the first mortgage with accrued interest, unpaid taxes, and certain other claims against the plaintiff. and that defendant would release the second mortgage of \$3,000 (due in about three years) held by his bank, and place the same of record subsequent to the \$6,000 first mortgage. The plaintiff further claims that defendant agreed to procure this loan at the rate of 6 per cent per annum, and that no commission was to be paid to the defendant for procuring such loan. The defendant, on the other hand, claims that it was agreed that the plaintiff should pay two years' interest in advance upon the \$3,000 second mortgage in consideration of the bank releasing such mortgage, and that it was further agreed that the first loan was to bear in all $8\frac{1}{2}$ per cent interest, of which $2\frac{1}{2}$ per cent was to be paid in advance as commissions for procuring the loan.

It is conceded that plaintiff and his wife executed and delivered the real estate mortgage and note for the \$6,000 loan, and that defendant received the proceeds thereof from the mortgagee. It is also conceded that the defendant properly disbursed \$4,475 thereof, of which amount \$4,155.81 was disbursed in paying off the first mortgage for \$3,000, with accrued interest thereon, and taxes outstanding against the land. The amount in dispute under the pleadings is \$1,525, which plaintiff claims is the balance due him. Defendant claims to be entitled to this sum in payment of the two years' interest on the \$3,000 second mort-

gage, commissions for procuring the loan, and traveling expenses in going to Wisconsin in connection with the loan.

Plaintiff brings this action to recover from the defendant the balance alleged to be due upon such real estate loan, and in his complaint alleges "that during the month of February, A. D. 1909, the above-named plaintiff made a loan in the sum of \$6,000, for which he gave his promissory note, and as security for the payment of which made, executed, and delivered a mortgage covering (certain-described lands in Barnes county); which said note and mortgage were executed and delivered by this plaintiff William Kurtz, to said defendant C. W. Paulson.

"That said C. W. Paulson, acting as the agent for the party making said loan to the said plaintiff, did then and there receive from his said principal the sum of \$6,000, as and for the proceeds of the loan, and did make application of the said proceeds in the payment of certain claims against and debts due and owing from the plaintiff herein, and did, from the said proceeds or the said sum of \$6,000, pay unto creditors of this plaintiff the sum of \$5,475, which said sum is properly chargeable against the money due and owing from this plaintiff under said loan; to wit, said sum of \$6,000.

"That there is due and owing to the plaintiff from said defendant by reason of the balance of the said loan not disbursed for and on behalf of this plaintiff or under his authorization, the sum of \$525, no part of which has been paid plaintiff by said defendant, and which said sum was due and payable to the plaintiff on the 1st day of March A. D. 1909."

The defendant in his answer admits that as agent for the plaintiff he secured a loan of \$6,000 from one J. J. Naset of Wisconsin, and that at the direction of the plaintiff he paid out on plaintiff's behalf certain sums of money, which, together with defendant's commission and expenses incident to making such loan, amounted to the full sum of \$6,000, and that there is nothing due and owing to plaintiff from the defendant.

In his original complaint plaintiff claimed only a balance of \$525, but upon the trial of the action he applied for, and was granted leave to amend his complaint by increasing the amount of the balance alleged to be due to the plaintiff from \$525 to \$1,525. By stipulation between counsel, the original answer was permitted to stand as the answer to

the amended complaint. Upon these pleadings the cause was submitted to the jury, which returned a verdict in favor of the plaintiff for \$1,015, with interest at 7 per cent from March 1, 1909. Judgment was entered pursuant to this verdict, and defendant has appealed from the judgment.

1. Defendant's first assignment of error challenges the correctness of the court's ruling in allowing the amendment of the complaint. Courts were established to dispense justice. Rules of procedure were formulated as a means to this end. The provisions of the Code of Civil Procedure and all proceedings under it must be liberally construed to affect the object thereof, and to promote justice. (Comp. Laws 1913, § 7321.) Trial courts are vested with wide discretionary powers in the matter of granting amendments to pleadings, "in the furtherance of justice." Comp. Laws 1913, § 7842; *First Nat. Bank v. Laughlin*, 4 N. D. 391, 395, 61 N. W. 473; *French v. State Farmers' Mut. Hail Ins. Co.* 29 N. D. 426, L.R.A.1915D, 766, 151 N. W. 7; *Ennis v. Retail Merchants' Asso. Mut. F. Ins. Co.* ante, 20, 156 N. W. 234; *Rectenbaugh v. Northwestern Port Huron Co.* 22 S. D. 410, 118 N. W. 697; 1 Enc. Pl. & Pr. 586 et seq. The amendment introduced no new feature into the case. The question at issue remained the same as under the original pleadings; *viz.*, What balance, if any, remained due to the plaintiff upon the real estate loan negotiated through the agency of the defendant? Defendant made no showing of surprise, nor did he ask for a continuance. We find no abuse of discretion in allowing the amendment.

2. The defendant also assigns error upon the exclusion of a certain chattel mortgage offered in evidence by the defendant.

As already stated, the questions in dispute were whether defendant was to procure the loan in question and temporarily release the second mortgage without any specific compensation for such service, or whether plaintiff agreed to pay defendant certain sums therefor.

It is undisputed that defendant's bank held a second mortgage for \$3,000 against the land in question, which second mortgage was subject to the first mortgage for \$3,800. The only other claims which defendant or his bank held against the plaintiff were three certain notes,—one for \$50, one for \$150, and one for \$430. The two first notes were paid out of the proceeds of the \$6,000 loan. Plaintiff claims that the

\$430 loan, also, should have been paid out of the proceeds of this loan, but the defendant claims that it was not to be so paid, and that there were no moneys for this purpose. The \$430 note was received in evidence, and the defendant offered in evidence the chattel mortgage securing the payment thereof. At the time of the offer, plaintiff's counsel objected to its admission on the ground that it was incompetent, irrelevant, and immaterial; not within the issues. Defendant's counsel stated that the chattel mortgage secured one of the notes mentioned in the testimony of plaintiff, which he claimed should have been paid out of the proceeds of the \$6,000 loan. In response to a statement of the court that the materiality of the evidence was not apparent, defendant's counsel stated: "I think it is material to show that this note was secured by chattel security; that there was no inducement on the part of the defendant for making this loan for the purpose of securing payment of this debt." The chattel mortgage which is contained in the record shows that this \$430 note was secured by a large amount of personal property, including, among other things, more than twenty head of horses, certain farm machinery, and crops.

We are of the opinion that the chattel mortgage should have been received in evidence. The theory of plaintiff, as indicated in his testimony, seems to have been that defendant was willing, and even anxious, to release the second mortgage for \$3,000, and permit a mortgage of \$6,000 to become a prior lien on the premises covered thereby, as well as make the loan without any charge therefor, in order to enable plaintiff to pay, out of the proceeds of the new loan, the three notes which he owed defendant's bank. It was for the jury to determine what the agreement or understanding was. Reasonable men have some reason for their acts. Why would defendant permit a \$6,000 first mortgage instead of a \$3,800 first mortgage to become a lien prior to his second mortgage for \$3,000? Why would defendant permit impairment of the security covered by the \$3,000 mortgage, and perform all the services in procuring and negotiating the new \$6,000 loan, all without compensation? These questions, as suggested by defendant's counsel, must have presented themselves to the jury. If defendant's bank held unsecured notes against the defendant aggregating \$638.25, the payment of such claims might constitute the inducement which caused defendant to do so. If, on the other hand, such claims or the major portion thereof

were amply secured, the payment of such notes would doubtless furnish less inducement. Under the evidence as submitted to the jury, it would be justified in believing that the defendant's bank held unsecured notes against the plaintiff, aggregating \$638.25. This would be incorrect because, as already stated, the \$430 note was amply secured by chattel security. In this case the evidence was evenly balanced, as the principal witnesses were the plaintiff and defendant, and we cannot say that the verdict might not have been substantially different if the chattel mortgage had been admitted in evidence.

The judgment must therefore be reversed, and the cause is remanded for further proceedings. It is so ordered.

MAGNUS PETERSON v. CORA E. DILL, and H. F. Shipley,
Intervener and Respondent.

(157 N. W. 301.)

Specific performance — action for — supreme court — trial de novo — findings of fact — trial court — conclusions — judgment — sustaining.

Action for specific performance, upon a trial *de novo* in the supreme court, the finding of fact of the trial court to the effect that respondent is a good-faith purchaser of the lands involved, without notice, actual or constructive, of plaintiff's alleged prior contract for the purchase thereof from the original owner, is sustained together with the conclusions and judgment pursuant thereto.

Opinion filed March 17, 1916.

Appeal from the District Court, Ramsey County, *Buttz*, J.

From a judgment in intervener's favor, plaintiff appeals.

Affirmed.

W. M. Anderson, for appellant.

Good faith consists in the honest intention to abstain from taking an unconscionable advantage of another, even through the forms or technicalities of law, and an absence of all information or belief of facts that would serve as notice. *Hunter v. Coe*, 12 N. D. 505, 97 N. W. 869; *Thompson v. Sioux Falls Nat. Bank*, 150 U. S. 231, 37 L. ed. 1063, 14 Sup. Ct. Rep. 94; *Dunn v. National Bank*, 15 S. D. 454, 90 N. W. 1045; *Merchant v. Pielke*, 10 N. D. 48, 84 N. W. 574; *State v. Stewart*,

9 N. D. 409, 83 N. W. 869; Code 1905, § 6701, Actual Notice, § 6702, Constructive Notice.

Knowledge of circumstances sufficient to put a prudent man on inquiry. *Shauer v. Alterton*, 151 U. S. 607, 38 L. ed. 286, 14 Sup. Ct. Rep. 442; *Doran v. Dazey*, 5 N. D. 167, 57 Am. St. Rep. 550, 64 N. W. 1023; *Meyer v. Davenport Elevator Co.* 12 S. D. 172, 80 N. W. 189.

Shipley had constructive notice of the prior transaction between plaintiff and defendant, and should perform defendant's contract. *Lodge v. Simonton*, 2 Penr. & W. 439, 23 Am. Dec. 47; *Parker v. Conner*, 93 N. Y. 118, 45 Am. Rep. 184; Code 1905, § 6618; *Blakeman v. Miller*, 136 Cal. 138, 89 Am. St. Rep. 120, 68 Pac. 587.

Middaugh, Cuthbert, Smythe, & Hunt, for respondent.

An acceptance to be effectual must be identified with the offer and unconditional. Where a definite offer is made, and the other person acts conditionally or injects a new term into his acceptance, it is not an acceptance of the original offer, and does not constitute a contract or agreement. *Wald's Pollock*, Contr. 3d ed. 43; 7 Am. & Eng. Enc. Law, 111, 138; 9 Cyc. 267; *Coad v. Rogers*, 115 Iowa, 478, 88 N. W. 947; *Kleinhans v. Jones*, 15 C. C. A. 644, 37 U. S. App. 185, 68 Fed. 742.

The acceptance must be of the offer as made, and this unconditional, to be of binding force. *Sawyer v. Brossart*, 67 Iowa, 678, 56 Am. Rep. 371, 25 N. W. 876; *Baker v. Holt*, 56 Wis. 100, 14 N. W. 8; 9 Cyc. 267, 280; *Wald's Pollock*, Contr. 3d ed. pp. 46, 47; *Beiseker v. Amberson*, 17 N. D. 215, 116 N. W. 94; *Harris Bros. v. Reynolds*, 17 N. D. 16, 114 N. W. 369; *Babcock v. Ormsby*, 18 S. D. 358, 100 N. W. 759.

A court of equity will not deprive a defendant of any right of property, whether legal or equitable, for which he has given value, without notice of plaintiff's equity, nor of any other common-law right acquired as an incident of his purchase. Professor Ames in his essay on "Purchasers for Value Without Notice." 39 Cyc. 1647.

The courts all unite on the proposition that in such cases there must be some inquiry which it is the duty of the purchaser to make. It is only as to the degree or amount of such inquiry that courts differ, and the circumstances of each case should control on this question. *Daly v. Rizzutto*, 59 Wash. 62, 29 L.R.A.(N.S.) 467, 109 Pac. 276; *Attebery*

v. O'Neil, 42 Wash. 487, 85 Pac. 270; Anderson v. Blood, 152 N. Y. 285, 57 Am. St. Rep. 515, 46 N. E. 493; E. B. Millar & Co. v. Olney, 69 Mich. 560, 37 N. W. 558; United States v. Detroit Timber & Lumber Co. 67 C. C. A. 1, 131 Fed. 668; Jones v. Simpson, 116 U. S. 609, 29 L. ed. 742, 6 Sup. Ct. Rep. 538; Ware v. Egmont, 4 De G. M. & G. 473, 24 L. J. Ch. N. S. 361, 1 Jur. N. S. 97, 3 Eq. Rep. 1, 3 Week. Rep. 48; Sugden, Vend. & P. 622; Wilson v. Wall, 6 Wall. 83, 91, 18 L. ed. 727, 730.

The right of specific performance is not absolute. Hunter v. Coe, 12 N. D. 505, 97 N. W. 869.

What makes inquiry necessary is such a visible state of things as is inconsistent with a perfect right in him who claims the benefit. Jones v. Simpson, 116 U. S. 609, 29 L. ed. 742, 6 Sup. Ct. Rep. 538; United States v. Detroit Timber & Lumber Co. 67 C. C. A. 1, 131 Fed. 668; E. B. Millar & Co. v. Olney, 69 Mich. 560, 37 N. W. 558; Anderson v. Blood, 152 N. Y. 285, 57 Am. St. Rep. 515, 46 N. E. 493; Daly v. Rizzutto, 59 Wash. 62, 29 L.R.A.(N.S.) 467, 109 Pac. 276.

FISK, Ch. J. Plaintiff seeks to compel specific performance of an alleged contract for the purchase of certain real property. The action was brought against the alleged vendor, Cora E. Dill, but service was not obtained on her, and she has not appeared. Shortly after the commencement of the action the respondent Shipley was permitted to intervene, claiming equitable ownership of the land, and praying that his title and right to possession be quieted as against the plaintiff. To the complaint in intervention, plaintiff answered alleging that the intervenor purchased the land from defendant Dill, with knowledge that plaintiff had a contract with her for his purchase thereof, and he prays for a dismissal of the intervenor's complaint, and for a judgment quieting his alleged equitable title to the land.

The intervenor had judgment in the court below, and plaintiff has appealed, specifying that he desires a trial *de novo* in the supreme court.

The facts are not seriously in dispute, and as found by the trial court are as follows:

"I. That at the time of the commencement of this action and at all times since the state of North Dakota was and is the owner in fee of

the southeast quarter of section six (6), township one hundred fifty-eight (158), range sixty-two (62), said land being located in the county of Ramsey and state of North Dakota.

"II. That on November 18, 1901, at a sale of the said premises as school land by the Board of University and School Lands of the State of North Dakota, at the city of Devils Lake, Ramsey county, North Dakota, one D. M. McCanna purchased of said state and received from the state of North Dakota a contract for the sale of said land for a consideration of \$10 per acre under the usual terms and conditions of the sale of state school lands of the state of North Dakota, said contract being known as contract No. 169.

"III. That on April 25, 1905, said D. M. McCanna assigned all his right, title, and interest in and to the said contract to the defendant Cora E. Dill, and her assignment thereof has been duly registered in accordance with law, and at the date of the commencement of this action all payments, including interest and taxes due upon the purchase price thereof under said contract, had been fully met.

"IV. That on December 8, 1911, the intervener, H. F. Shipley, purchased from the defendant Dill all her right, title, estate, and interest in and to said premises, and under said school land contract, and paid to the defendant Dill the sum of \$580 in cash, and at the same time made and delivered to her his promissory note for \$930, with interest at 7 per cent per annum, due on January 1, 1913, and his other note for the same amount and at the same rate of interest due on January 1, 1914, and thereupon the defendant Dill made and delivered to the intervener a good and sufficient assignment of the said school land contract and of all of her right, title, estate, and interest in and to said land, which assignment was in a form acceptable to the Board of University and School Lands and the land commissioner of the state of North Dakota, and thereafter and on January 8, 1912, the intervener paid to the state of North Dakota through the county treasurer of Ramsey county the instalment of principal on said contract which fell due on January 1, 1912, amounting to \$320, and also paid the interest on said contract for the year 1912 amounting to \$38.40, and on October 31, 1913, paid the taxes due on said premises for the year 1912 in the amount of \$37.

"V. That the said purchase by the intervener from the defendant Dill

of said premises, the said payments made by him, and the making and delivery of his promissory notes, the execution and delivery of her assignment of said contract for said premises to him, the payments by the intervener made to the state of principal and interest as aforesaid, and each and all of the foregoing acts and all negotiations and circumstances connected therewith, were made and had by the intervener, H. F. Shipley, in entire good faith, without any notice or knowledge of the claims of any other person as to ownership or equity in said premises or said school land contract, and without any actual or constructive notice or knowledge of any facts or circumstances sufficient to put him on inquiry as to the existence of a claim made by the plaintiff, Magnus Peterson, of ownership or interest acquired in said premises or the school land contract therefor; and the court finds that the intervener, H. F. Shipley, was and is a purchaser for value in good faith and without notice, and thereupon became the equitable owner of said premises.

“VI. That on or about November 30, 1911, the defendant Dill did enter into negotiations with the plaintiff Peterson for the sale of said premises and her interest therein, which resulted in an agreement between them for the sale of said premises, and the purchase thereof by plaintiff Peterson for a consideration of \$20 per acre; but no papers were executed to consummate the contract, nor was any payment made, and the court finds that the intervener, H. F. Shipley, had no notice or knowledge, either actual or constructive, of any claims made by the plaintiff Peterson of ownership or interest in said premises acquired by virtue of said agreement between the plaintiff Peterson and the defendant Dill, and said intervener had no notice or knowledge, either actual or constructive, of such agreement having been made.

“VII. That at the time of said purchase by the intervener, H. F. Shipley, the records of the Board of University and School Lands and of the auditor of Ramsey county, North Dakota, showed the ownership of said school land contract to be in the defendant, Cora E. Dill, by assignment from the original owner of said contract, the said D. M. McCanna.

“VIII. That on and prior to December 8, 1911, the defendant Dill was in possession of said premises, and thereafter and upon the sale of said premises to the intervener, H. F. Shipley, as aforesaid, and upon the assignment of the state school land contract from the defend-

ant Dill to the intervener Shipley, he immediately entered into the possession of said premises, and at all times thereafter has been and still is in possession thereof, and has during the years 1912 and 1913 conducted the usual farming operations thereon."

Appellant challenges the findings to the effect that in making his purchase respondent acted in good faith and without any notice or knowledge of his rights, and also to the effect that plaintiff acquired no vested rights in the land through his alleged purchase. These are the questions which we are called upon to retry. If we reach the conclusion that respondent made his purchase without notice, actual or constructive, of appellant's alleged rights, it will not be necessary for us to determine the disputed question as to whether, in fact and law, appellant acquired an equitable interest in the land, as he contends.

That respondent had no actual notice is clear. At the most, in so far as the record discloses, he merely had notice that appellant had been negotiating with Dill for the purchase of the land, and that she, for some unknown reason, intended to give him a first opportunity to purchase. In brief, we are in full accord on this point with the very clear views of the trial judge as expressed in his memorandum decision, and we adopt the same as the views of this court, as follows: "Peterson claims that Shipley took the land with notice of his outstanding contract with Miss Dill, and therefore took it subject to such contract, and must fulfil her contract and convey the land to him. If he did have such knowledge, either actual or constructive, Mr. Peterson must prevail. *Hunter v. Coe*, 12 N. D. 505, 97 N. W. 869; *Horgan v. Russell*, 24 N. D. 490, 43 L.R.A.(N.S.) 1150, 140 N. W. 99.

The sum total of Mr. Shipley's knowledge of Mr. Peterson's dealings with Miss Dill is best set out in two documents: (1) A telegram in answer to Shipley's wire, which reads: "If M. Peterson does not buy, will accept your offer; sent letter Sunday;" and (2) a letter the substance of which is as follows: "Your telegram received. Mr. M. Peterson has first chance with the land in question. Should he fail to buy and make contract, I will accept your offer as stated in telegram."

There were other items of testimony in the record with reference to Miss Dill's conversation with Mr. Shipley, but there is nothing else in the record that may be construed as strongly against Mr. Shipley as the matters quoted. To be sure, some of plaintiff's questions put to intervener intimate or insinuate more knowledge on Shipley's part; but the

answers in each case absolutely negative such claims, and the court must pass on the case as the record stands, not as a party may contend it ought to stand.

There was, of course, no *actual* notice to Mr. Shipley, nor does Peterson so claim. Was there any such *constructive* knowledge as places Mr. Shipley in a position that it can be said he cannot conscientiously retain the benefits of his bargain? I think not. I agree with counsel in his statement in his brief: "The most that can be said of this evidence is that Mr. Shipley was informed that Mr. Peterson had been considering the purchase of this land. Nothing further. It should be particularly noted that Shipley had not knowledge at any time that Peterson claimed to have bought the land."

"What makes inquiry necessary is such a visible state of things as is inconsistent with a perfect right in him" who claims the benefit. Jones v. Simpson, 116 U. S. 609, 29 L. ed. 742, 6 Sup. Ct. Rep. 538; United States v. Detroit Timber & Lumber Co. 67 C. C. A. 1, 131 Fed. 668; E. B. Millar & Co. v. Olney, 69 Mich. 560, 37 N. W. 558; Anderson v. Blood, 152 N. Y. 285, 57 Am. St. Rep. 515, 46 N. E. 493; Daly v. Rizzutto, 59 Wash. 62, 29 L.R.A.(N.S.) 467, 109 Pac. 276.

The matters brought to Mr. Shipley's knowledge were not sufficient to charge him with either actual or constructive notice of Mr. Peterson's rights. Under the evidence Mr. Shipley was a purchaser in good faith, for value and without notice, and must prevail.

Entertaining these views it necessarily follows that the judgment must be affirmed, with costs.

EVA ROTT v. HELEN GOEHRING.

(L.R.A.1916E, 1086, 157 N. W. 294.)

Husband's affections — alienation of — by unmarried woman — action against — by wife — abandonment.

1. An action by a married woman against an unmarried woman for alienation

Note.—The right of a wife under modern married women's acts to sue for alienation of the affection of her husband is set forth in notes in 4 L.R.A.(N.S.) 643; 29 L.R.A.(N.S.) 842; and L.R.A.1915A, 67.

Generally, on the wife's right to sue for alienation of her husband's affection, see also notes in 28 Am. St. Rep. 217 and 46 Am. St. Rep. 472.

of her husband's affections will lie even though plaintiff's husband has not completely and in a literal sense abandoned her.

Wrongful acts of defendant — conjugal affection — society — wife deprived of — marriage contract — injury — recovery.

2. If through defendant's alleged wrongful acts the plaintiff's husband was induced and persuaded to deprive plaintiff of the conjugal affection and society which the marriage contract entitled her to enjoy, she has a right to recover for the injury thus inflicted.

Personal relations — wife's conjugal rights — violation of — protection.

3. Section 4355, Comp. Laws 1913, which prescribes what is forbidden by the rights of personal relation, was not intended to prescribe the only rules of conduct as to the violation of the wife's conjugal rights. *Held*, further, following *King v. Hanson*, 13 N. D. 85, that subdivision 1 of said section gives to the wife the same protection as subdivision 2 gives to the husband.

Liability — degree of fault — husband's conduct — defendant's conduct — exoneration.

4. Defendant will not be exonerated from all liability merely because the plaintiff's husband may have been more blamable than defendant.

Husband and wife — estrangement of wife — defendant — illicit relations with husband — action.

5. The fact that plaintiff was estranged from her husband prior to his illicit relations with defendant will not defeat the action.

Criminal conversation — action for — married woman — causes — allegations.

6. Whether an action will lie by a married woman for criminal conversation, and also whether such a cause of action is alleged in the complaint, not decided for reasons stated.

Illicit relations — direct proof of — not required — circumstantial evidence — sufficient.

7. Direct proof of illicit relations is not required, circumstantial evidence being sufficient.

Opinion filed March 17, 1916.

Appeal from District Court of Logan County, *Nuessle, J.*

From a judgment in plaintiff's favor, defendant appeals.

Affirmed.

Curtis & Curtis and H. P. Remington, for appellant.

The complaint does not charge adultery or abandonment. His affections may have been alienated, but that is not a substantive cause of ac-

tion; it is merely an aggravation of damages, for the loss of consortium. *Neville v. Gile*, 174 Mass. 305, 54 N. E. 841; *Bigaouette v. Paulet*, 134 Mass. 123, 45 Am. Rep. 307; *Evans v. O'Connor*, 174 Mass. 287, 75 Am. St. Rep. 316, 54 N. E. 557; *Lellis v. Lambert*, 24 Ont. App. Rep. 653; *Webber v. Benbow*, 211 Mass. 366, 97 N. E. 758.

In such cases, the actionable wrong is the abandonment of the wife by the husband, from the improper influences of the defendant. Mere ineffectual attempt to alienate does not constitute actionable wrong. The question is, Did plaintiff's husband abandon her, and was this brought about by the wrongful acts of the defendant? *King v. Hanson*, 13 N. D. 85, 99 N. W. 1085; *Humphrey v. Pope*, 122 Cal. 253, 54 Pac. 847; *Codoni v. Donati*, 6 Cal. App. 83, 91 Pac. 423; *Foot v. Card*, 58 Conn. 1, 6 L.R.A. 829, 18 Am. St. Rep. 258, 18 Atl. 1027.

At common law an action for mere alienation cannot be maintained. A complaint by a wife which charges no adultery, no procuring, enticing, or harboring or secreting, does not state a cause of action. *Houghton v. Rice*, 174 Mass. 366, 47 L.R.A. 310, 75 Am. St. Rep. 351, 54 N. E. 843.

The right of action must be based on the loss of consortium, "the right to the conjugal fellowship of the husband, to his society, his support, and aid in every conjugal relation." *Evans v. O'Connor*, 174 Mass. 287, 75 Am. St. Rep. 317, 75 N. E. 316; *Comp. Laws* 1913, §§ 4331, 4355, subdiv. 1.

A. B. Atkins and *G. M. Gannon*, *W. S. Lauder* of counsel, for respondent.

The ancient theory of both the law and society that the wife was inferior to the husband, and in such cases as the one here presented "could suffer no loss or injury," is but a legal fiction, and even that long since faded away, especially in this country. She stands in a position to-day, possessed of every right of vindication for wrongs, and may seek and have the aid of our courts upon every just cause. *Westlake v. Westlake*, 34 Ohio St. 621, 32 Am. Rep. 397; *Foot v. Card*, 58 Conn. 1, 6 L.R.A. 829, 18 Am. St. Rep. 258, 18 Atl. 1027; *Haynes v. Nowlin*, 28 Am. St. Rep. 213, and note, 129 Ind. 581, 29 N. E. 389; *Seaver v. Adams*, 66 N. H. 142, 49 Am. St. Rep. 597, 19 Atl. 776; *Bennett v. Bennett*, 116 N. Y. 584, 6 L.R.A. 553, 23 N. E. 17; *Dodge v. Rush*, 28 App. D. C. 149, 8 Ann. Cas. 671; *Deitzman v. Mullin*, 108

Ky. 610, 50 L.R.A. 808, 94 Am. St. Rep. 390, 57 S. W. 247; 1 Cooley, Torts, p. 478.

In this state women have been entirely emancipated. Comp. Laws 1913, §§ 4350, 4411.

"No one should suffer by the act of another." Code, § 8254.

"For every wrong there is a remedy." Code, §§ 4350, 7257; Bennett v. Bennett, 116 N. Y. 584, 6 L.R.A. 553, 23 N. E. 17.

The wife can prosecute actions and recover for herself. Dodge v. Rush, 28 App. D. C. 149, 8 Ann. Cas. 671.

The wife has an action for damages against another woman for committing adultery with her husband. Scott v. O'Brien, 129 Ky. 1, 16 L.R.A.(N.S.) 742, 130 Am. St. Rep. 419, 110 S. W. 260; Seaver v. Adams, 66 N. H. 142, 49 Am. St. Rep. 597, 19 Atl. 776; Clow v. Chapman, 125 Mo. 101, 26 L.R.A. 412, 28 S. W. 328, 46 Am. St. Rep. 468, and note 472; Foot v. Card, 58 Conn. 1, 6 L.R.A. 829, 18 Am. St. Rep. 258, 18 Atl. 1027; Haynes v. Nowlin, 129 Ind. 581, 14 L.R.A. 787, 28 Am. St. Rep. 213, 29 N. E. 389; Westlake v. Westlake, 34 Ohio St. 621, 32 Am. Rep. 397; Hart v. Knapp, 76 Conn. 135, 100 Am. St. Rep. 989, 55 Atl. 1021.

In its broad sense, "consortium" means the right of the wife to the fellowship, company, co-operation, loyalty, and aid of her husband in every conjugal relation. Bigaouette v. Paulet, 134 Mass. 123, 45 Am. Rep. 307; Jacobsen v. Siddal, 12 Or. 280, 53 Am. Rep. 360, 7 Pac. 108; Crowell v. Truesdell, 67 App. Div. 502, 73 N. Y. Supp. 1013; Long v. Booe, 106 Ala. 570, 17 So. 716; Lockwood v. Lockwood, 67 Minn. 476, 70 N. W. 784; Betser v. Betser, 186 Ill. 537, 52 L.R.A. 630, 78 Am. St. Rep. 303, 58 N. E. 249; Reading v. Gazzam, 200 Pa. 70, 49 Atl. 889; Seaver v. Adams, 66 N. H. 142, 49 Am. St. Rep. 597, 19 Atl. 776; Kelley v. New York, N. H. & H. R. Co. 168 Mass. 308, 38 L.R.A. 631, 60 Am. St. Rep. 397, 46 N. E. 1063.

With respect to property, contracts, and torts, the wife has the same capacity as before marriage. Comp. Laws 1913, § 4411; Jaynes v. Jaynes, 39 Hun, 40; Deitzman v. Mullin, 108 Ky. 610, 50 L.R.A. 808, 94 Am. St. Rep. 390, 57 S. W. 247; Warren v. Warren, 89 Mich. 123, 14 L.R.A. 545, 50 N. W. 842.

In this class of cases, it is not necessary to a recovery that the wife show actual abandonment, actual abduction, or adultery. The loss of

consortium is the basis of her right to recover. *Adams v. Main*, 3 Ind. App. 232, 50 Am. St. Rep. 266, 29 N. E. 792; 1 Bishop, Marr. & Div. § 1361.

If the wife has suffered this loss, her right to redress is absolute; it cannot be made to depend upon any condition. *Foot v. Card*, 58 Conn. 1, 6 L.R.A. 829, 18 Am. St. Rep. 258, 18 Atl. 1027; *Heermance v. James*, 47 Barb. 120; *Fratini v. Caslini*, 66 Vt. 273, 29 Atl. 252, 44 Am. St. Rep. 843, and note 845.

Such a wrong is of great magnitude. *Vollmer v. Stregge*, 27 N. D. 589, 147 N. W. 797.

Proof of adultery or criminal conversation need not be by direct evidence; it may be by circumstantial evidence. 3 Rice, Ev. pp. 532, et seq.; 2 Greenl. Ev. 14th ed. §§ 40, et seq.; 21 Cyc. 1630, et seq. and notes.

The proof need not be beyond reasonable doubt. A preponderance is only necessary. *Sieber v. Pettit*, 200 Pa. 58, 49 Atl. 763; *Reading v. Gazzam*, 200 Pa. 70, 49 Atl. 889; *State v. Leek*, 152 Iowa, 12, 130 N. W. 1062, and cases cited; *State v. Baker*, 146 Iowa, 612, 125 N. W. 659; 1 Century Dig. § 31; *Stackhouse v. Stackhouse*, 88 Neb. 184, 129 N. W. 257; 14 Cyc. 693, et seq. and notes.

FISK, Ch. J. Plaintiff had judgment in the court below for \$1,500 and costs; and defendant has appealed, alleging insufficiency of the evidence and errors of law.

Counsel differ as to the nature of the action, appellant's counsel stating that it is for alienation of affections alone, while respondent's counsel assert that it is both for alienation of affections and for criminal conversation. In our judgment it matters little which is technically correct, for in this jurisdiction forms of action are expressly abolished,—§ 7355 Comp. Laws,—and if the facts alleged in the complaint, when properly established, entitle plaintiff to any relief under the law, she may recover.

The complaint alleges:

1. "That the plaintiff, Eva Rott, is now and for seven years last past has been the wife of one Jacob J. Rott."

2. "That beginning about January 1, 1912, and continuing and including the months of April, May, June, and July, 1914, and while

33 N. D.—27.

this plaintiff was living, cohabiting with, and being supported by her husband, Jacob J. Rott, at Napoleon, North Dakota, and was so living with him happily as his wedded wife, and enjoying his affections, support, protection, and respect, and the defendant well knowing said Jacob Rott to be the husband of this plaintiff, and wrongfully intending to injure this plaintiff and deprive her of said husband's protection, society, aid and support, wilfully, wickedly, and maliciously gained the affection of said Jacob J. Rott, and has enticed him to have carnal intercourse with her, and has sought to persuade him and entice him by protestations of love and otherwise to leave this plaintiff without support, and to go and live with defendant."

3. "That thereafter and at various times during the above-mentioned months, the defendant has continued her unlawful and wrongful intercourse with the said Jacob J. Rott, and is continuing and unlawfully and maliciously trying to entice the said Jacob J. Rott to desert this plaintiff, and to leave her without means of support or protection, and to go away with defendant, and has wilfully and maliciously debauched him, all of which has been against the plaintiff's will."

4. "That by reason of the premises the said Jacob J. Rott is no longer a dutiful husband, and his affection and regard for plaintiff have been destroyed, and plaintiff has been and still is wrongfully deprived by the defendant of the affection and regard of her husband, and the happiness and benefits which otherwise she would have received at his hands; that the plaintiff and her husband are the parents of three children all of whom are alive, and plaintiff is also suffering great distress of mind and body, and has suffered damage in the amount of five thousand dollars (\$5,000)."

The answer admits paragraph one of the complaint, but denies generally all other allegations.

It will be observed that the very pith and marrow of the complaint is that the defendant alienated the husband's conjugal affections from the wife by persuading and inducing him to deny his conjugal society to her, and by enticing him to lavish on her his adulterous affections and society, and that she succeeded in repeatedly enticing and persuading him to have carnal intercourse with her.

Do these facts give rise to a cause of action to the wife? All must agree that defendant's conduct, if established as alleged, constituted a

most flagrant violation of and injury to the inherent marital rights of the plaintiff, and the question is as to whether the law affords her any redress for the detriment thus suffered by her.

Appellant's counsel assert that the action being solely for alienation of affections, and the proof disclosing that there was no actual *abandonment* of the wife by her husband, the action will not lie; and they cite and confidently rely upon the case of *King v. Hanson*, 13 N. D. 85, 99 N. W. 1085. We do not deem this case an authority in appellant's favor on this point. The question as to what constitutes abandonment and the necessity of proving the same was not up for decision in that case, and this for the obvious reason that it was expressly conceded that an actual physical abandonment had taken place, and the great contention between counsel was whether it took place in Wisconsin or in Minnesota or North Dakota, appellant's counsel contending that it occurred in the former state, and therefore the action would not lie because there was no actionable wrong under the holdings of the Wisconsin court. But this court expressly held that under the undisputed evidence the tort was consummated in Minnesota.

Conceding therefore, for the sake of argument, that the action at bar is one solely for alienation of affections, as appellant's counsel contend, we are to decide whether the fact that the plaintiff's husband did not actually and in the literal sense of the term abandon her will operate to defeat her right to recover. We are clear that it will not. To hold otherwise would, in our opinion, be a travesty on justice. To hold that the flagrant wrongs inflicted upon plaintiff's marital rights cannot be redressed in the courts unless the wrongdoer has actually succeeded in destroying the home by causing an actual abandonment thereof by the husband is contrary not only to common sense, but to our notions of natural justice. If counsel's contention is correct, what becomes of the maxims in the jurisprudence of this state, "No one should suffer by the act of another," and that, "For every wrong there is a remedy?" Wherever there is a valuable right, and an infringement thereof causing damage which is susceptible of admeasurement, the law will afford the injured person complete reparation, as far as possible.

The question here presented being one of first impression in this jurisdiction, we are free to adopt such rule as commends itself to our best judgment; and, regardless of what the courts may have held in

other places, we unhesitatingly decide that the sane, sensible, and sound rule is that announced by the Connecticut court in *Foot v. Card*, 58 Conn. 1, 6 L.R.A. 829, 18 Am. St. Rep. 258, 18 Atl. 1027, from which we quote: "It is the contention of the defendant that the admission by the plaintiff that she and her husband are still living together is an admission that she now has and enjoys all that the marriage contract can, or intended to, secure to her; and that she has neither in law nor in fact suffered any injury. But this admission is to be considered in the light of that made by the defendant, namely, that she has during the last fifteen years lived in continual adulterous intercourse with the husband,—an intercourse procured by her influence over him. Upon this admission it becomes certain that whatever may have been the measure or quality of the remnant of conjugal affection and society permitted to the plaintiff by the defendant, as a matter of fact, and of law as well, the plaintiff has been deprived of the conjugal affection and society which the marriage contract entitled her to enjoy and required her husband to give; and that a valuable right, absolutely sole in her and incapable of division, has been injured.

"It is not a prerequisite to the right of the plaintiff to maintain this suit in her own name that she should have been abandoned by her husband in the literal sense, nor that she should have actually separated herself from him by or without a decree of divorce. If she has suffered the wrong complained of, her right to redress is absolute; it cannot be made to depend upon any of these conditions. As long as she keeps her marriage contract, so long she has the right to the conjugal society and affection of her husband. Possibly she may regain these. This possibility is her valuable right. The defendant may not demand that she shall sacrifice it for the future as the price of redress for injuries in the past. Upon the pleadings there is a valuable right in the wife solely, and an injury thereto for which damages must be given to her solely, notwithstanding the fact that she is living with her husband; therefore the law cannot refuse its assistance. The rules of law which the defendant invokes for her protection are not applicable to the case." This court in the *King-Hanson Case* expressly gave its full approval to the pronouncement of the Connecticut court in the above case, as well as many like cases from other courts. We deem it useless to again cite them in this opinion. While the precise

point here under consideration did not arise in the King-Hanson Case, we have no doubt that this court would have approved the unanswerable reasoning and logic of the Connecticut court on such point had it been there involved. While, as appellant contends, § 4355 expressly forbids merely the *abduction* of the husband from his wife, and while it forbids the abduction or *enticement* of the wife from the husband, it by no means follows that this statute was intended to prescribe the only rule of conduct as to the violation of the wife's conjugal rights, leaving the wrongdoer to commit with impunity other violations of such rights. Moreover, this court, in *King v. Hanson*, expressly gave its approval to *Humphrey v. Pope*, 122 Cal. 253, 54 Pac. 847, holding to the effect that subdivision 1 of said section gives to the wife the same protection as subdivision 2 gives to the husband. This being true, appellant's argument is unsound.

The courts are quite unanimous in holding that the gist of actions of this nature is the loss of consortium, and they are also quite generally agreed that "consortium" means, as counsel for respondent argues, "something more than mere physical presence in the home. To entitle plaintiff to recover, it was not absolutely necessary to show actual abandonment—actual abduction—or adultery. . . ." "To understand this, we do not need to go to any musty tomes, nor resort to ancient court decisions; we need consult only our own common sense,—our sense of right and wrong, and what we, ourselves, know of human nature. We all know that nothing else—not even death itself—will cause a sensitive wife so much anguish, shame, misery, and heartache, as to learn that her husband has been untrue to his marriage vows or has transferred his affections to another. In such circumstances is the wife's agony any less—is the wrong done her any less—by the husband remaining in the family home with her? We know that, in such circumstances, the husband's presence in the family only intensifies the wife's agony—yet the whole defense is based on the assumption that if there was no actual abduction—no actual abandonment—the wife—the plaintiff—suffered no wrong for which the law affords her a remedy." As said in *Adams v. Main*, 3 Ind. App. 232, 50 Am. St. Rep. 266, 29 N. E. 792: "Whatever may have been the principle, originally, upon which this class of actions was maintainable, it is certain that the weight of modern authority bases the action on the loss of the *con-*

sortium,—that is, the society, companionship, conjugal affections, fellowship, and assistance. *The suit is not regarded in the nature of an action by a master for the loss of the services of his servant, and it is not necessary that there should be any pecuniary loss whatever.*"

The fact, if it be a fact, that the husband was more to be blamed than the defendant, does not exonerate the latter from liability; nor will plaintiff's action be defeated because plaintiff was estranged from her husband prior to his illicit relations with defendant. *Miller v. Pearce*, 86 Vt. 322, 43 L.R.A.(N.S.) 332, 85 Atl. 620.

Having reached the above conclusion, it is immaterial to plaintiff's recovery whether the complaint also states a cause of action for criminal conversation, and also as to whether the latter kind of action will lie in this state at the suit of the wife. We shall therefore refrain from deciding this question; but the following authorities sustaining such an action may be of interest to the legal profession. They also lend support to our views above expressed: 8 Am. & Eng. Enc. Law, 2d ed. 261; *Seaver v. Adams*, 66 N. H. 142, 49 Am. St. Rep. 597, 19 Atl. 776; *Dodge v. Rush*, 28 App. D. C. 149, 8 Ann. Cas. 671. See also as in point on principle: *Scott v. O'Brien*, 129 Ky. 1, 16 L.R.A.(N.S.) 742, 130 Am. St. Rep. 419, 110 S. W. 260; *Clow v. Chapman*, 46 Am. St. Rep. 468, and note (125 Mo. 101, 26 L.R.A. 412, 28 S. W. 328); *Haynes v. Nowlin*, 129 Ind. 581, 14 L.R.A. 787, 28 Am. St. Rep. 213, 29 N. E. 389; *Westlake v. Westlake*, 34 Ohio St. 621, 32 Am. Rep. 397; *Hart v. Knapp*, 76 Conn. 135, 100 Am. St. Rep. 989, 55 Atl. 1021; *Bennett v. Bennett*, 116 N. Y. 584, 6 L.R.A. 553, 23 N. E. 17.

The author of the article on Criminal Conversations in 8 Am. & Eng. Enc. Law, 2d ed. 261, says: "As regards the husband, from time immemorial the law has given him a right of action for damages against the seducer of his wife. But as regards the wife, though in natural justice no reason exists why her right to maintain an action against the seductress of her husband should not be coextensive with his right of action against her seducer, yet the common law has never seen fit to accord to her the redress which it affords him. The reason of this distinction must, it seems, be discovered not in any principle of abstract right, but in the subservient relation which the wife occupied at the common law. The husband had a property in the wife's services, and

it is upon the loss of these that his right of recovery was formerly placed; but the wife had no property in the services of her husband and so could maintain no action. Moreover, at common law, in order for her to bring an action, the husband must consent to and be joined as a party plaintiff; and furthermore, as whatever damages she might recover would immediately become his property, the law could not tolerate such an indecency as that a man should so profit by his own wrong. But the tendency of modern thought is to abrogate the idea of superior and inferior from the relation of husband and wife, and as, under the statutes which have in recent years been passed in the various states, married women are permitted to sue independently of their husbands and to hold separate property, the reasons for the distinction would seem no longer to be tenable, and it has been held that under such statutes a married woman may maintain an action for criminal conversation."

It is next contended that the evidence is insufficient to sustain the judgment. The chief reasons given for alleged insufficiency of the evidence involve legal propositions already answered by us adversely to appellant's contentions. The others have been considered and found without merit. Owing to the nature of the case, we choose not to set forth the testimony at length in this opinion. Suffice it to say that we deem the verdict and judgment amply supported in the record by competent testimony.

The law is well settled that direct proof of illicit relations is not required, circumstantial evidence being sufficient. 3 Rice, Ev. p. 532; 2 Greenl. Ev. 14th ed. §§ 40 et seq.; 21 Cyc. 1630; State v. Leek, 152 Iowa, 12, 130 N. W. 1062; Stackhouse v. Stackhouse, 88 Neb. 184, 129 N. W. 257; 14 Cyc. 693.

We find no error in the record, and the judgment is accordingly affirmed.

A. A. NOVAK, Administrator of the Estate of Barbara Mikesk, v.
J. H. LOVIN and Mary Lovin.

(157 N. W. 297.)

**Action—triable by jury—jury waived—tried to court—supreme court—
trial de novo—not permitted.**

1. A trial *de novo* cannot be had in the supreme court in an action properly triable to a jury, even though a jury was waived and the cause tried to the court.

Promissory notes—action on—by administrator—contract—not testamentary—defense—signature—genuineness.

2. In an action by an administrator to recover on certain promissory notes executed and delivered to the intestate by defendants, the defense was that the notes were given pursuant to the terms of the following written instrument:

Voss, N. D., Dec. 22, 1897.

I, Barbara Mikesk, being desirous of placing some moneys with my daughter and son-in-law, Mary E. and J. H. Lovin, which I wish to save for my declining years, I agree to place said moneys with them on the following conditions: That I accept such note or notes for said moneys and such rate of interest as the said Mary E. and J. H. Lovin see fit to give me, and further that said note or notes to be hereafter given for said moneys shall be non-transferable and shall be payable to no one but myself, and that in case I should die while said notes are in force they shall at once become null and void and not collectable.

(Signed) Barbara Mikesk.

Held, for reasons stated, that such instrument is not testamentary in character, and if the signature thereto is genuine the defense relied on is complete. *Moore v. Weston*, 13 N. D. 574, is referred to and distinguished from the case at bar.

Signature—forgery—contract—findings—remanding cause—new trial—issues.

3. No finding having been made upon the controlling issue as to the alleged forgery of the payee's signature to such instrument, the cause is remanded for a new trial on that issue.

Opinion filed March 17, 1916.

Note.—Generally on what constitutes testamentary writings, see note in 89 Am. St. Rep. 486.

Appeal from District Court of Stark County, *Crawford, J.*

From a judgment in plaintiff's favor, defendants appeal.

Reversed and new trial ordered.

L. A. Simpson, for appellant.

The fact that defendants in their answer did not assert the invalidity of the note because of its execution and delivery on a legal holiday does not preclude them from availing themselves of such defense. *Jacobson v. Bentzler*, 127 Wis. 566, 4 L.R.A.(N.S.) 1151, 115 Am. St. Rep. 1052, 107 N. W. 7, 7 Ann. Cas. 633.

A loan of money on Sunday is void, and not subject to a ratification on a subsequent day. A promissory note bearing the date of a secular day, but in fact made and delivered on Sunday, is invalid as between the parties. *Cook v. Forker*, 193 Pa. 461, 74 Am. St. Rep. 699, 44 Atl. 560; *Cranson v. Goss*, 107 Mass. 439, 9 Am. Rep. 45; *Thompson v. Williams*, 58 N. H. 248; *Rosenbaum v. Hayes*, 10 N. D. 311, 86 N. W. 973; *Troewert v. Decker*, 51 Wis. 46, 37 Am. Rep. 808, 8 N. W. 26; *Pearson v. Kelly*, 122 Wis. 660, 100 N. W. 1064; *Terry v. Platt*, 1 Penn. (Del.) 185, 40 Atl. 243; *Finn v. Donahue*, 35 Conn. 216; *Meader v. White*, 66 Me. 90, 22 Am. Rep. 551; *Tamplin v. Still*, 77 Ala. 374; *Block v. McMurry*, 56 Miss. 217, 31 Am. Rep. 357; *Crocket v. Vanderveer*, 3 N. J. L. 856; *International Textbook Co. v. Ohl*, 150 Mich. 131, 13 L.R.A.(N.S.) 1157, 121 Am. St. Rep. 612, 111 N. W. 768; *Parker v. Pitts*, 73 Ind. 597, 38 Am. Rep. 155; *Moseley v. Hatch*, 108 Mass. 517; *O'Donnell v. Sweeney*, 5 Ala. 467, 39 Am. Dec. 336; *Hill v. Wilker*, 41 Ga. 449, 5 Am. Rep. 540; *Adams v. Hamell*, 2 Dougl. (Mich.) 73, 43 Am. Dec. 455; *Moore v. Weston*, 13 N. D. 574, 102 N. W. 163; *Bedford v. Chandler* (*Perrin v. Chandler*) 81 Vt. 270, 17 L.R.A.(N.S.) 1239, 130 Am. St. Rep. 1057, 69 Atl. 874; *Blanchard v. Sheldon*, 43 Vt. 512; *Hackett v. Moxley*, 65 Vt. 71, 25 Atl. 898; *Green v. Tulane*, 52 N. J. Eq. 169, 28 Atl. 9; *Sebrell v. Couch*, 55 Ind. 122.

The note became void in any event, upon the death of the payee. *Hinkle v. Landis*, 131 Pa. 573, 18 Atl. 941; *McGlasson v. McGlasson*, 22 Ky. L. Rep. 1843, 56 S. W. 510.

This was not a testamentary contract or document. The money was and became a gift. *Beatty v. Western College* (*Miller v. Western College*) 177 Ill. 280, 42 L.R.A. 797, 69 Am. St. Rep. 242, 52 N. E.

432; Doty v. Willson, 47 N. Y. 580; Re Hicks, 14 N. Y. S. R. 320; Martin v. Funk, 75 N. Y. 134, 31 Am. Rep. 446.

It is clear that the intention of the deceased was to make an absolute gift. M'Kane v. Bonner, 1 Bail. L. 113; Barringer v. Bes Line Constr. Co. 23 Okla. 131, 21 L.R.A.(N.S.) 597, 99 Pac. 775; Tabler v. Sheffield Land, Iron & Coal Co. 79 Ala. 377, 58 Am. Rep. 593; Young's Estate, 148 Pa. 573, 24 Atl. 124; Sunday's Estate, 167 Pa. 30, 31 Atl. 353; Hegeman v. Moon, 131 N. Y. 462, 30 N. E. 487; Kragnes v. Kragnes, 125 Minn. 115, 145 N. W. 785; Thomas v. Page, 3 McLean, 167, Fed. Cas. No. 13,906; Jilson v. Gilbert, 26 Wis. 637, 7 Am. Rep. 100; Peabody v. Peabody, 59 Ind. 556; Kytile v. Kytile, 128 Ga. 387, 57 S. E. 748; Boblett v. Barlow, 26 Ky. L. Rep. 1076, 83 S. W. 145.

The agreement and the notes were but one contract. Tranter v. Hibbard, 108 Ky. 265, 56 S. W. 169; Graham v. Alexander, 123 Mich. 168, 81 N. W. 1084; Specht v. Beindorf, 56 Neb. 553, 42 L.R.A. 429, 76 N. W. 1059.

This contract was to "pay to the payee" and to no other person, and if the payee did not elect to enforce the same during her lifetime, it was to become void. The payee did not demand payment, nor did she ever try to enforce payment, and the notes are void, just as she said in her contract they should be. Martin v. Monroe, 107 Ga. 330, 33 S. E. 62; Herrick v. Edwards, 106 Mo. App. 633, 81 S. W. 466; Oldenburg v. Baird, 26 Ind. App. 379, 58 N. E. 1073.

The fact that the donor retains the interest and income from the gift during her lifetime in no way invalidates the other gift. Gifts may be acceptable with any condition. 14 Am. & Eng. Enc. Law, 1044; Blake v. Coleman, 22 Wis. 415, 99 Am. Dec. 53; Barnard v. Cushing, 4 Met. 230, 38 Am. Dec. 362.

T. F. Murtha (and *John H. Fraine, Goheen & Goheen*, of counsel), for respondent.

Private business may be legally done on a legal holiday. 21 Cyc. 441.

The validity of a promissory note in such instance is determined by its *delivery*, and not by the date of its signing. Comp. Laws 1913, § 7938, subdiv. 10.

A note made on Sunday and delivered on a subsequent secular day

is valid. 2 Parsons, Contr. 905; King v. Graef, 136 Wis. 548, 20 L.R.A.(N.S.) 86, 128 Am. St. Rep. 1101, 117 N. W. 1058; 37 Cyc. 563; 7 Cyc. 686; Beman v. Wessels, 53 Mich. 549, 19 N. W. 179; Conrad v. Kinzie, 105 Ind. 281, 4 N. E. 863; Bell v. Mahin, 69 Iowa, 408, 29 N. W. 331; Barger v. Farnham, 130 Mich. 487, 90 N. W. 281.

It will be conclusively presumed that the court made such findings of fact as are necessary to support the conclusions of law and the judgment. 1 Sutherland, Pl. §§ 1180-1192.

There was no gift of money to the defendants. The money remained the property of the deceased during her lifetime. She attempts to give this money to them after her death. This cannot be done without the formalities of the law required. Comp. Laws 1913, § 5649; 40 Cyc. 1084, 1089; Moore v. Weston, 13 N. D. 574, 102 N. W. 163; Tuttle v. Raish, 116 Iowa, 331, 90 N. W. 66; Perry, Trusts, § 92; Leaver v. Gauss, 62 Iowa, 314, 17 N. W. 522; Conrad v. Douglas, 59 Minn. 498, 61 N. W. 673; Fitzgerald v. English, 73 Minn. 266, 76 N. W. 27; Burlington University v. Barrett, 22 Iowa, 60, 92 Am. Dec. 376; Saunders v. Saunders, 115 Iowa, 278, 88 N. W. 330; Ferris v. Neville, 127 Mich. 444, 54 L.R.A. 464, 89 Am. St. Rep. 480, 86 N. W. 960; Clay v. Layton, 134 Mich. 317, 96 N. W. 458; Ogle's Estate, 97 Wis. 56, 72 N. W. 389; Re Lautenshlager, 80 Mich. 285, 45 N. W. 147; McKinnon v. McKinnon, 46 Fed. 722, 5 C. C. A. 530, 14 U. S. App. 433, 56 Fed. 412; Bowdoin College v. Merritt, 75 Fed. 483; Foxworthy v. Adams, 136 Ky. 403, 27 L.R.A.(N.S.) 308, 124 S. W. 381, Ann. Cas. 1912A, 327; Stark v. Kelley, 132 Ky. 376, 113 S. W. 498.

To constitute a gift *inter vivos*, the property must be delivered absolutely and the gift must go into effect at once, and where future control over the property remains in the donor until his death, there is no valid gift *inter vivos*. Foxworthy v. Adams, 136 Ky. 403, 27 L.R.A.(N.S.) 308, 124 S. W. 381, Ann. Cas. 1912A, 327; Re Acken, 144 Iowa, 519, 123 N. W. 187, Ann. Cas. 1912A, 1173.

The notes are collectable by the administrator notwithstanding the restriction on transfer. Such restriction merely destroys the negotiability of the notes, but does not prevent an assignment. Butler v. Rockwell, 14 Colo. 125, 23 Pac. 462; Wagner v. Cheney, 16 Neb. 202, 20

N. W. 222; Johnson v. Eklund, 72 Minn. 195, 75 N. W. 14; Shively v. Semi-Tropic Land & Water Co. 99 Cal. 259, 33 Pac. 848; School Dist. v. Whalen, 17 Mont. 1, 41 Pac. 849; 39 Cyc. 1675 (b), (c); Comp. Laws 1913, § 5784; 2 Parsons, Contr. 7th ed. 662; 18 Cyc. 874, 875; Barringer v. Bes Line Constr. Co. 23 Okla. 131, 21 L.R.A. (N.S.) 597, 99 Pac. 775.

FISK, Ch. J. Plaintiff as administrator of the estate of one Barbara Mikesh sues to recover the sum of \$800 and interest on two promissory notes of \$400 each, executed and delivered to the intestate by the defendants, who are her son-in-law and daughter. The first note is dated at Voss, North Dakota, on January 1, 1898, payable to the order of intestate on January 1, 1900, with interest from date at 8 per cent per annum. The other is dated at Voss, North Dakota, on January 20, 1903, and payable to the order of intestate one year after date, with interest at 6 per cent per annum after maturity. The first has these words indorsed thereon: "This note is non-negotiable," and the latter bears the following indorsement: "This note is not negotiable or assignable, and will be paid to the person named thereon only." The answer puts in issue all the allegations of the complaint, and by way of new matter defendants allege that prior to the execution of either of the notes the intestate executed and delivered to defendants the following instrument, being exhibit "A:"

Voss, N. D., Dec. 22, 1897.

I, Barbara Mikesh, being desirous of placing some moneys with my daughter and son-in-law, Mary E. and J. H. Lovin, which I wish to save for my declining years, I agree to place said moneys with them on the following conditions: That I accept such note or notes for said moneys and such rate of interest as the said Mary E. and J. H. Lovin see fit to give me, and further that said note or notes to be hereafter given for said moneys shall be nontransferable and shall be payable to no one but myself, and that in case I should die while said notes are in force they shall at once become null and void and not collectable.

(Signed) Barbara Mikesh.

In brief, it is the principal theory of the defense that the considera-

tion for both notes was advanced by Barbara Mikesch pursuant to the provisions of exhibit "A," and not otherwise; and that such instrument is valid and operated in law to relieve them of all liability on such notes from and after the demise of the payee. On the other hand, plaintiff's contention is that the signature to exhibit "A" is a forgery, and that in any event the instrument is testamentary in character and void because not executed with the formalities required of wills, there being no subscribing witnesses and no acknowledgment as required by § 5649, Compiled Laws. A jury was waived, and at the conclusion of the trial the lower court made findings and conclusions favorable to plaintiff, holding, among other things, that the instrument aforesaid which purports to bear the signature of Barbara Mikesch is testamentary in character and void because not executed as required by the statute above cited. No finding was made in the court below on the issue of alleged forgery of the signature of deceased.

From the judgment entered in plaintiff's favor, defendants have appealed, specifying in a general way certain errors and also specifying that they desire a review of the entire case in the supreme court. Of course the latter specification cannot be entertained in a case of this nature, it being properly a jury, and not a law, case. Hence a trial *de novo* cannot be had in this court. The statute is plain to this effect, and the question is also firmly settled by this court in numerous cases. See Comp. Laws 1913, § 7846; Laffy v. Gordon, 15 N. D. 282, 107 N. W. 969. While, as above stated, the so-called specifications of error are very general, we shall nevertheless treat them as sufficient to raise the question as to the correctness of the conclusions of law from the facts as found.

For the purposes of this appeal we shall assume that the trial court arrived at its conclusion solely on the ground that exhibit "A," bearing the purported signature of Barbara Mikesch, is void for the reasons given, there being no finding either way upon the issue as to the alleged forgery of the signature thereto. Should we reach a conclusion contrary to that of the learned trial court on such a question of law, it will be necessary to remand the cause for a determination of the issue left undecided. In other words, as to such issue a mistrial took place below, and this court is powerless to sit as a court of original jurisdiction to decide such issue. If, on the other hand, we reach the same

conclusion as did the lower court on the law, a decision of such issue of fact becomes immaterial. With this statement we proceed to decide what we deem the controlling question before us, which is the legal force and validity of the instrument, exhibit "A" aforesaid. Is such exhibit testamentary in character?

The intestate loaned the moneys to defendants, taking their promise to repay the same together with certain interest thereon. Clearly, if the intestate executed exhibit "A," she had in mind an intent to retain the right to collect the notes, with interest, for her use and benefit during her declining years. In fact she so expresses her intent in explicit language. This negatives an intent to make a present unqualified gift to defendants. She evidently intended to reserve the right to collect such notes whenever she was in need of money. To this extent, at least, we fully concur in the views of respondent's counsel. But we are unable to concur with them in their statement that "the money remained the property of the deceased during her lifetime. She attempts to give *this* money to the defendants after death." When she loaned the money to defendants she parted with the title thereto, and it became their property, and they had a right to do with it as they saw fit. It was not a special deposit for safe-keeping, for defendants were given the use of it for a consideration, viz., the promise to pay interest thereon, and to repay the amount of the principal upon a contingency, or upon condition. The respondents' counsel cite numerous authorities in support of their contention that exhibit "A" is testamentary in character, and among others they say that *Moore v. Weston*, 13 N. D. 574, 102 N. W. 163, is directly in point and controlling, and they quote from the opinion as follows: "Upon the back of a promissory note payable on demand, there was written an unsigned memorandum to the effect that, if the note was not paid in full before payee's death, the makers should expend the amount due on the note for payee's funeral expenses and for a monument and for caring for the lot in which he was buried. Held, that the terms of the memorandum, under the facts of this case, do not constitute a defense to the note, although complied with after the payee's death, and such memorandum was a testamentary disposition of property and invalid unless made by will."

"If there had been an irrevocable delivery of the money for the purpose named in the memorandum, a different question would be before

us. But he controlled this property during his lifetime, and the law took hold of it for the purposes of administration upon his death. The estate cannot be administered by an agent appointed in this manner. . . . 'We think it may be declared a general rule that, if the intended disposition of property be of a testamentary character, not to take effect in the testator's lifetime, such disposition will be inoperative, unless declared in writing in conformity with the statute relating to wills.' " Ibid.

"He had made no absolute disposition . . . of the debt evidenced by the note during his lifetime for the purpose indicated by the memorandum. The title to the note was in him at all times."

We think there is a clear distinction between the case at bar and *Moore v. Weston*. In the latter case the payee of the note attempted to direct how the balance due on the note at the time of his death should be expended. In other words he attempted to control the disposition of that portion of his estate after his demise; while in the case at bar the clear intention of the intestate was to exonerate the makers of the notes from all liability for any sum unpaid at the date of her demise. She did not intend, in other words, that the defendants' obligations on the notes should survive after her death. On the contrary she intended that the notes should have no post mortem effect or validity.

The question for decision, therefore, is whether such intent can be given effect. We think this question should be answered in the affirmative. We fail to see, for reasons already given, how exhibit "A" can be construed as testamentary in its nature. The authorities which seem to be in any way in point support our view. *Bedford v. Chandler* (*Perrin v. Chandler*) 81 Vt. 270, 17 L.R.A. (N.S.) 1239, 130 Am. St. Rep. 1057, 69 Atl. 874; *Blanchard v. Sheldon*, 43 Vt. 512; *Hackett v. Moxley*, 65 Vt. 71, 25 Atl. 898; *Green v. Tulane*, 52 N. J. Eq. 169, 28 Atl. 9; *Sebrell v. Couch*, 55 Ind. 122; *Hegeman v. Moon*, 131 N. Y. 462, 30 N. E. 487; *Carnwright v. Gray*, 127 N. Y. 92, 12 L.R.A. 845, 24 Am. St. Rep. 424, 27 N. E. 835.

According to the rule announced by these authorities and which meets with our full approval, the intestate, at the time she turned over these moneys to defendants in exchange for their limited promise of payment of the notes given therefor, must be held to have made a present executed gift to them of so much of the moneys as she should

not collect in her lifetime; that the title thereto passed at once to the defendants, subject only to a right of defeasance in her, which right terminated at her death, and that the reservation of such right of defeasance did not invalidate such gifts. See, as also supporting our views: *Hinkle v. Landis*, 131 Pa. 573, 18 Atl. 941; *McGlasson v. McGlasson*, 22 Ky. L. Rep. 1843, 56 S. W. 510.

It follows that the judgment must be reversed and the cause remanded for a new trial to the end that the issue of fact as to the alleged forgery of intestate's signature to exhibit "A" may be tried and decided in the District Court. It is so ordered.

THE COUNTY OF STARK IN THE STATE OF NORTH DAKOTA, a Municipal Corporation, v. ADAM F. MISCHEL, Dominick Wetzstein, Thomas Bran, Adam Forster, Jos. Kilzer, Delbert Hughes, National Surety Co. of New York, a Corporation, Frank A. Roquette, T. F. Murtha, Peter F. Berringer, and J. P. Berringer.

(156 N. W. 931.)

Action by county — county commissioners — state's attorney — complaint — cause of action — bonds of officials — principals — sureties.

1. Action by Stark county to recover \$4,794 of county commissioners and former state's attorney Murtha and bondsmen of said officials, for paying that amount to said state's attorney, who received it for obtaining and collecting a judgment for \$9,589 against a former defaulting county auditor and his surety. *Held*: The complaint states a cause of action against the former officials as principals and against their sureties.

Principals and sureties — public money — officials — diversion of public money — indemnity contract.

2. Principals and sureties may be joined in one action, as the liability of each and all sprung from the joint acts of the principals and against whose wrongful diversion of public money the sureties have contracted to indemnify.

Liability — officials — sureties — public funds.

3. The liability of all arose from the one transaction,—alleged misappropriation of public funds.

Action — ex contractu — ex delicto — causes — may be joined.

4. Causes of action *ex contractu* and *ex delicto* may be joined under such circumstances.

Complaint — demurrer — causes of action — failure to state separately — remedy.

5. A demurrer to a complaint does not reach a failure to separately state causes of action.

Opinion filed February 16, 1916. Rehearing denied March 18, 1916.

From an order of the District Court of Stark County, *Crawford, J.*, overruling demurrer, defendants appeal.

Affirmed.

Engerud, Holt, & Frame and *Lawrence & Murphy*, for appellant.

The complaint states various separate causes of action, some in tort, some upon contract, and others seeking equitable relief, and against different defendants, not of the same class, the causes of action not common to all, and the liability of defendants, if any, being separate and distinct. Such a complaint cannot stand the ordinary test of pleadings. *Mares v. Wormington*, 8 N. D. 333, 79 N. W. 441; *Taughner v. Northern P. R. Co.* 21 N. D. 111, 129 N. W. 750; *Keep v. Kaufman*, 56 N. Y. 332; 1 Enc. Pl. & Pr. 186; *Wiles v. Suydam*, 64 N. Y. 177; *New York & N. H. R. Co. v. Schuyler*, 17 N. Y. 604; *Young v. Young*, 81 N. C. 95; *Adams v. Bissell*, 28 Barb. 386; *Anderson v. Hill*, 53 Barb. 245; *Teall v. Syracuse*, 32 Hun, 332; *Hodges v. Wilmington & W. R. Co.* 105 N. C. 170, 10 S. E. 917; *Brown v. Rice*, 51 Cal. 489; *Bailey v. Dale*, 71 Cal. 34, 11 Pac. 804; *Feder v. Field*, 117 Ind. 386, 20 N. E. 129; *Cosgrove v. Fisk*, 90 Cal. 75, 27 Pac. 56; *Sutherland*, Code Pl. p. 128; *Davis v. Novotney*, 15 S. D. 118, 87 N. W. 582; *Fraley v. Bentley*, 1 Dak. 25, 46 N. W. 506; *Story*, Eq. Pl. § 2795; *Daniel*, Chancery Pl. & Pr. 395; *Winslow v. Jenness*, 64 Mich. 84, 30 N. W. 908; *Bowman v. Purtell*, 15 Jones & S. 403; *Thompson v. St. Nicholas Nat. Bank*, 61 How. Pr. 163; *Loup v. California Southern R. Co.* 63 Cal. 99; *Barham v. Hostetter*, 67 Cal. 272, 7 Pac. 689; *Alger v. Scoville*, 1 Code Rep. N. S. 303, 6 How. Pr. 131; *Warth v. Radde*, 18 Abb. Pr. 396, 20 How. Pr. 230; *Butt v. Cameron*, 53 Barb. 642; *Smith v. Geortner*, 40 How. Pr. 185; 33 N. D.—28.

Newcombe v. Chicago & N. W. R. Co. 55 Hun, 607, 8 N. Y. Supp. 366; Jasper v. Hazen, 2 N. D. 404, 51 N. W. 583.

A claim arising out of an alleged tort cannot be joined in the same action with a claim for money had and received; causes *ex delicto* cannot be joined with causes *ex contractu*. Teem v. Ellijay, 89 Ga. 154, 15 S. E. 33; Croghan v. New York Underwriters' Agency, 53 Ga. 112; Hart v. Metropolitan Elev. R. Co. 15 Daly, 391, 7 N. Y. Supp. 753; French v. Salter, 17 Hun, 546; Rizer v. Davis County, 48 Kan. 389, 29 Pac. 595; Hoyer v. Raymond, 25 Kan. 665; Chiradella v. Bourland, 32 Cal. 588; Loup v. California Southern R. Co. 63 Cal. 99; Sheldon v. The Uncle Sam, 18 Cal. 527, 79 Am. Dec. 193; Sacramento v. Dunlap, 14 Cal. 421; Barnes v. Metropolitan Street R. Co. 119 Mo. App. 303, 95 S. W. 971; Code Civ. Proc. § 484, subdiv. 9; McClure v. Wilson, 13 App. Div. 274, 43 N. Y. Supp. 209.

Even if such causes could be united, still the complaint is open to the criticism that they are not separately stated, as required by our Code. Rev. Codes 1905, § 6877, Comp. Laws 1913, § 7466; Niven v. Peoples, 23 N. D. 207, 136 N. W. 73.

Causes of action joined in a complaint must affect all parties alike. 1 Enc. Pl. & Pr. 209; Gray v. Rothschild, 112 N. Y. 668, 19 N. E. 847; Foreman v. Boyle, 88 Cal. 290, 26 Pac. 94; Barham v. Hostetter, 67 Cal. 274, 7 Pac. 689; Winslow v. Jenness, 64 Mich. 84, 30 N. W. 905; First Nat. Bank v. D. S. B. Johnson Land Mortg. Co. 17 S. D. 522, 97 N. W. 748; Hall v. Susskind, 109 Cal. 209, 41 Pac. 1012; McCarty v. Fremont, 23 Cal. 197; Niven v. Peoples, 23 N. D. 207, 136 N. W. 73; Simmons v. Fairchild, 42 Barb. 404; Victory, Webb, etc. Mfg. Co. v. Beecher, 55 How. Pr. 193; Sleeper v. Baker, 22 N. D. 391, 39 L.R.A. (N.S.) 864, 134 N. W. 716, Ann. Cas. 1915B, 1189.

H. A. Burgeson, L. A. Simpson, W. F. Burnett, and Thos. H. Pugh, for respondents.

The county officials have no authority to compromise a claim the county has against a solvent debtor, or to employ the state's attorney to perform, for extra remuneration, duties already incumbent upon him as such officer, and for which he is paid a salary. Fox v. Walley, 13 N. D. 611, 102 N. W. 161; Storey v. Murphy, 9 N. D. 115, 81 N. W. 23; Pierson v. Minnehaha County, 28 S. D. 534, 38 L.R.A. (N.S.) 261, 134 N. W. 212; Wilson v. Otoe County, 71 Neb. 435.

98 N. W. 1050; Platte County v. Gerrard, 12 Neb. 244, 11 N. W. 298; Logan County v. Jones, 4 Okla. 341, 51 Pac. 565; Brome v. Cuming County, 31 Neb. 362, 47 N. W. 1050; State v. Stockwell, 23 N. D. 70, 134 N. W. 767; State ex rel. Braatelen v. Drakeley, 26 N. D. 87, 143 N. W. 768; Comp. Laws 1913, § 3376, subdvs. 3, 9-13, § 3492.

Where a number of defendants are joined, and where the damages sought grow out of one wrong common to all, the mere fact that the degree of liability of one defendant may be different from that attaching to another makes no difference and affords no legal ground for objection. 23 Cyc. 432; Schilling v. Black, 49 Kan. 552, 31 Pac. 143; State ex rel. Cook v. Smith, 119 N. C. 350, 25 S. E. 958; Cummings v. American Gear & Spring Co. 87 Hun, 598, 34 N. Y. Supp. 541; Fish v. Chase, 114 Minn. 460, 131 N. W. 631; State use of Clendenin v. Schneider, 35 Mo. 533; Holeran v. School Dist. 10 Neb. 406, 6 N. W. 472; Greenberg v. Whitcomb Lumber Co. 90 Wis. 225, 28 L.R.A. 439, 48 Am. St. Rep. 911, 63 N. W. 93; Council Bluffs Sav. Bank v. Griswold, 50 Neb. 753, 70 N. W. 376; Champlin Bros. v. Sperling, 84 Neb. 633, 121 N. W. 976; Richard v. Detroit, R. R. & L. O. R. Co. 129 Mich. 458, 89 N. W. 52; 23 Cyc. 424; Bliss, Code Pl. § 118; Bendoragle v. Cocks, 19 Wend. 207, 32 Am. Dec. 448; Comp. Laws 1913, § 7407.

The pleading will be liberally construed, and if it presents facts sufficient for a recovery, allegations of fact sufficient to reasonably apprise the defendants of the nature of the claim against them, it will be upheld as against demurrer. First Nat. Bank v. Messner, 25 N. D. 263, 141 N. W. 999; Golden Valley Land & Cattle Co. v. Johnstone, 21 N. D. 97, 128 N. W. 690; Randall v. Johnstone, 20 N. D. 493, 123 N. W. 687; Weber v. Lewis, 19 N. D. 473, 34 L.R.A. (N.S.) 364, 126 N. W. 105; Klemik v. Henricksen Jewelry Co. 122 Minn. 380, 142 N. W. 871; Vukelis v. Virginia Lumber Co. 107 Minn. 68, 119 N. W. 509; Bieri v. Fonger, 139 Wis. 150, 120 N. W. 862; Nugent v. Teachout, 67 Mich. 571, 35 N. W. 254; Casey v. American Bridge Co. 95 Minn. 11, 103 N. W. 623; Danielson v. Garage Equipment Mfg. Co. 151 Wis. 492, 139 N. W. 443; Purcell v. St. Paul F. & M. Ins. Co. 5 N. D. 100, 64 N. W. 943.

The demurrer is joint, and as such it must be overruled, if the com-

plaint states a cause of action against any of the defendants. *Dalrymple v. Security Loan & T. Co.* 9 N. D. 306, 83 N. W. 245; *State v. Brooks-Scanlon Lumber Co.* 128 Minn. 300, 150 N. W. 912; *Rochford v. School Dist.* 17 S. D. 542, 97 N. W. 747; *Evans v. Fall River County*, 9 S. D. 130, 68 N. W. 195; *Millerke v. Reiley*, 31 S. D. 342, 141 N. W. 136; *Burk v. Muskegon Mach. & Foundry Co.* 98 Mich. 614, 57 N. W. 804; *Clark v. Lovering*, 37 Minn. 120, 33 N. W. 776; *Mark Paine Lumber Co. v. Douglas County Improv. Co.* 94 Wis. 322, 68 N. W. 1013; *Boyd v. Mutual Fire Asso.* 116 Wis. 155, 61 L.R.A. 918, 98 Am. St. Rep. 948, 90 N. W. 1086, 94 N. W. 171; *St. Croix Timber Co. v. Joseph*, 142 Wis. 55, 124 N. W. 1049; *Coffee v. Dewart*, 31 S. D. 102, 139 N. W. 776.

Goss, J. This is an action brought against the former county commissioners and state's attorney of Stark county and their bondsmen. A demurrer for misjoinder of defendants and causes of action was overruled, and from which this appeal is taken. The complaint sets forth the official capacity of the defendants, their qualification as such officials, and that certain defendants are sureties on the official bonds of said other defendants. That there existed in favor of the county a cause of action against one White, formerly county auditor, and the Northern Trust Company as surety on White's bond, and upon which cause of action suit had been brought and "in which said action judgment was then about to be entered in favor of the plaintiff and against said White and Northern Trust Company for \$9,239.13, all of which said defendant officials (county commissioners and state's attorney) then and there well knew." "That on the 18th day of February, 1913, the defendant commissioners in violation of their several duties and trusts as public officers of the plaintiff unlawfully engaged defendant Murtha (state's attorney) to collect said claim, and for his commission and services in that behalf unlawfully agreed to pay him one half of all such moneys so collected," and "acting as the board of county commissioners of Stark county adopted a resolution embodying the terms of said unlawful agreement therein;" "that it was then and there the duty of said defendant Murtha, as the state's attorney of the plaintiff, to perform the work aforesaid without receiving therefor any additional compensation, all of which said defendants

then and there well knew." That the next day "February 19, 1913, upon trial of the action so instituted by the plaintiff herein as plaintiff against the said White and Northern Trust Company as defendants, the plaintiff recovered judgment against the said White and Northern Trust Company as defendants in the sum of \$9,239.13, which judgment was duly entered and docketed." That the Northern Trust Company paid plaintiff \$9,589.42, in satisfaction of said judgment. That before said payment and on September 8, 1913, "in furtherance of the alleged pretended agreement hereinbefore set forth, and without any other or further consideration, and in violation of their duty and trust as officials of the plaintiff, the defendant county commissioners, then acting as and being the board of county commissioners of Stark county, ordered and directed that a warrant upon the county treasurer of said county for the sum of \$4,794.71 be made in favor of defendant Murtha by the chairman of said board, and by the auditor of said county delivered to defendant Murtha. That thereupon a pretended warrant for said sum was accordingly drawn, executed, and delivered to said Murtha." That "on September 9, 1913, said warrant was by said Murtha presented to said county treasurer of plaintiff, indorsed by said defendant on the back thereof, and the said county treasurer refused payment thereof for want of funds, and indorsed the fact thereon; and on September 11, 1913, the said warrant was paid by said county treasurer of plaintiff; and the sum named therein, \$4,794.71 of the money of the plaintiff, was paid by said county treasurer to the said defendant; that the defendants have not repaid the same nor any part thereof to plaintiff." Seventeen different paragraphs of the complaint are taken up in charging the foregoing matters. A cause of action against such officials is under *Fox v. Walley*, 13 N. D. 610, 102 N. W. 161, beyond question set forth in the foregoing allegations. The commissioners were devoid of power individually or as a board to legally make or bind the county by such a purported contract, and the state's attorney illegally obtained the money of the county. All said officials were jointly and severally responsible for the money so misappropriated. The complaint then alleges in the closing paragraph: "That by reason of the foregoing allegations said several bonds herein set forth, copies of which are hereto attached and marked exhibits 'A,' 'B,' and 'C,' have been and are breached

in the conditions thereof, and there is due and owing to the plaintiff the sum of \$4,794.71," and judgment is asked against the defendants for said amount, with interest. The complaint also contains a recitation that, upon proceedings had, the judge of the district court for Stark county appointed the attorneys appearing as respondent's counsel attorneys to prosecute this action. The bonds referred to are those of defendant Mischel, with defendants Wetzstein, Braun, Forster, and Kilzer as sureties, and that of commissioner Hughes with the National Surety Company as surety, and the bond of state's attorney Murtha with B. F. and J. P. Berringer, as sureties thereon. Attached to the complaint and made a part of it is the following resolution of the board of February 18, 1913: "Resolved, that T. F. Murtha, an attorney at law of Dickinson, North Dakota, be retained to attend to the defense of this county in the three cases now pending in the United States district court for the district of North Dakota, and he is to save this county harmless from all expense on account of said litigation, and is to receive for said services and such disbursements a sum equal to one half of the sum recovered actually paid into the county treasury of this county from the Northern Trust Company on the bonds of former auditor White. If there is no recovery on said bonds, said attorney is to receive no compensation either for services or disbursements." The official bonds are in the usual form and amounts, and the sureties therein have been joined with principals as defendants.

While many matters are briefed, counsel on argument of the appeal stated that he abandoned all questions raised by the demurrer, except that of improper joinder of causes of action. At the outset it should be observed that while the liabilities of the several defendants differ, and those of the sureties are upon contract insuring against breach of official duty of their principals, yet all relate to a breach of statutory duty prescribed and exacted by law, and that any and all liabilities of any of said defendants to the plaintiff accrue because of, and were occasioned by, the joint wrongful misappropriation by the principals acting as officials of county money. As to the principals in the transaction, there can be no question of the right to join them in one action as defendants, any more than the right to join co-conspirators in an action to recover damages resulting from a conspiracy. To this point there is practical unanimity of authority. "The act of each tort

feasor is the act of all, and each one is held for the acts of all." Phillips, Code Pl. § 455. "Where several acts are done in pursuance of a single fraudulent scheme, all persons may be joined who in any manner have participated in such scheme or received anything through it." 23 Cyc. 431. "The common-law causes of action which are of the same nature and require the same judgment may ordinarily be united in the same action." 1 R. C. L. 362. To this point the right of joinder of these four defendants in one action is elementary. Nor is it really seriously questioned in appellant's brief.

But can the sureties be joined in this action against the principals is the main question. True it is the joinder of causes of action *ex contractu* and *ex delicto*, actions arising from contract with one sounding in tort. While often the line of demarcation may be drawn between joinder of such actions, such general rule can have no application here, because the right of recovery springs from the same transaction, the joint act of the principals for whom the other codefendants are sureties against such very misconduct. "By virtue of statute in many, if not all, of the so-called code states, there may be a joinder in one complaint of two or more causes of action where they arise out of the same transaction. The word 'transaction' as used in such statutes meaning something which has taken place whereby a cause of action has arisen and embracing not only contractual relations, but occurrences in the nature of tort as well. It is no objection to the joinder of causes of action that they concern separate primary rights; for however numerous may be minor transactions each constituting a primary right enforceable by the proper remedy, so long as they all reach back to the point of union as the parent cause thereof they all arise out of one 'transaction' and may be vindicated together, regardless of the form of remedy requisite as to each, provided they affect all the parties and do not require different places of trial. Causes of action arising out of the same transaction which may be joined under the rules above stated include legal and equitable causes; also causes *ex contractu* and *ex delicto*." 1 R. C. L. 363, under joinder of causes of action, citing, among others, the following cases: Mayberry v. Northern P. R. Co. 100 Minn. 79, 12 L.R.A.(N.S.) 675, 110 N. W. 356, 10 Ann. Cas. 754; Aylesbury Mercantile Co. v. Fitch, 22 Okla. 475, 23 L.R.A.(N.S.) 573, 99 Pac. 1089; Emerson v. Nash, 124 Wis. 369,

70 L.R.A. 326, 109 Am. St. Rep. 944, 102 N. W. 921; McArthur v. Moffett, 143 Wis. 564, 33 L.R.A.(N.S.) 264, 128 N. W. 445; Craft Refrigerating Mach. Co. v. Quinnipiac Brewing Co. 63 Conn. 551, 25 L.R.A. 856, 29 Atl. 76; Butler v. Barnes, 60 Conn. 170, 12 L.R.A. 273, 21 Atl. 419; Bradley v. Aldrich, 40 N. Y. 504, 100 Am. Dec. 528; Volker-Scowcroft Lumber Co. v. Vance, 36 Utah, 348, 24 L.R.A.(N.S.) 321, 103 Pac. 970, Ann. Cas. 1912A, 124; Solomon v. Bates, 118 N. C. 311, 54 Am. St. Rep. 725, 24 S. E. 478. "Causes of action arising out of the same transaction or transactions connected with the same subject of action as the phrase is used in the Codes may be taken to mean as in substance declaring that when a right or certain connected rights between the same parties are brought into legal controversy, all transactions between the parties bearing on the state of these rights may be included within the scope of the action, although such transactions considered as independent transactions would in their nature call for different forms of legal procedure for the purpose of investigation, according to the practice that prevailed prior to the adoption of the Code. Barrett v. Watts, 13 S. C. 441; Suber v. Allen, 13 S. C. 317," quoting from 23 Cyc. 430. "It has been held in many cases that actions may be brought on distinct indemnity bonds joining different sets of sureties where the bonds relate to the same matters and the rights and liabilities of each set of sureties depend upon those of the others. A cause of action against the officer on a breach of his official bond may be joined with a cause of action against the sureties thereon for the same breach." 23 Cyc. 432. "Contrary to the common-law rule, causes arising *ex delicto* may be joined with those arising *ex contractu*, if they have a common origin in one transaction or in transactions connected with the same subject of action." Phillips, Code Pl. § 199. An examination of the authorities will convince that the modern trend is favoring convenience in litigation and toward obviating multiplicity of suits; and that the code provisions as to joinder of causes of action and parties must be construed and applied, where possible, without substantial prejudice to the rights of litigants, in the light of said principles of convenience and finality of decision. 30 Cyc. 1228; Fairfield v. Southport Nat. Bank, 77 Conn. 423, 428, 59 Atl. 513. As to what is meant by the word "transaction" must be determined upon principle in each case. But one trans-

action gave origin to all primary rights involved in the case at bar. The liability of the principals to the county accrued because of their joint acts diverting the money. By that same wrongful diversion, transaction, they breached their official bonds as well, and brought into existence a liability of their sureties to respond for the result of such acts indemnified against. And the conditions of all bonds sued upon are identical in such respect. Every bond is a statutory bond with breach of liability defined by statute, and all are breached by the same wrongful joint transaction. As the liability against all the principals arises from the one series of transactions participated in by all of them, all of them may be joined, and all of the bondsmen may be held to respond with the principals in the same action. And why should it be otherwise? Why should this case proceed to judgment against the principals, and then it be necessary to separately sue the bondsmen when the bondsmen cannot then deny the liability of their principals to the county as against the judgment against the principals receivable in evidence as at least *prima facie* proof against the sureties, even where the sureties were not parties to the action against the principals in the first instance? *Beauchaine v. McKinnon*, 55 Minn. 318, 43 Am. St. Rep. 506, 56 N. W. 1065; *Barker v. Wheeler*, 60 Neb. 470, 83 Am. St. Rep. 541, 83 N. W. 678; *Stevens v. Carroll*, 131 Iowa, 170, 105 N. W. 653. Cases to the contrary may be found in California and possibly one or two other states. But, by the great weight of authority, the judgment against a public officer as principal upon an official bond is at least *prima facie* conclusive against his surety, even where the surety was not a party to the original action against the officer. Authorities are evenly divided on whether such a judgment is *prima facie* conclusive, or conclusive against the surety in the absence of fraud. If it be established, then, that as charged in the complaint that county funds have been misappropriated by the defendant commissioners and state's attorney, the only further question to establish liability against the sureties is proof that they are sureties upon the official bond of such defaulting officials. On the contrary, should the defendants default in answer or defense to the sureties' prejudice, the latter may defend as parties in interest to prevent a collusive judgment against their principal and directly binding them. Hence there can be no complications to detract from main issues of liability accruing

from the common source, the one transaction which constitutes the breach of both official duty and official bonds.

There is some comment in appellants' brief about causes of action not being separately stated. This ruling is upon a demurrer to the complaint, and a demurrer "does not raise this defect in the complaint," assuming that there is such a defect. That is a matter of substance, not of pleading, which a demurrer because of misjoinder does not raise. *Morgan v. State*, 9 S. D. 230, 68 N. W. 538. "It is no longer a ground of demurrer under our procedure that the plaintiff has set forth two causes of action in his complaint when his purpose is to recover only a single claim. It is not a case of failure to set forth a cause of action. Instead of that, the complaint states two causes of action. Such a case would not fall within any ground of demurrer." *Purcell v. St. Paul F. & M. Ins. Co.* 5 N. D. 100-105, 64 N. W. 943.

The order appealed from overruling the demurrer is affirmed, with costs.

BRUCE, J., dissenting. I am unable to concur in the above opinion. I can see every reason for relaxing the rules of pleading where no demurrer has been interposed and the trial has been entered upon or completed. I can see none, whatever, for any such laxity when a demurrer has been seasonably interposed to the complaint.

As I construe the complaint it sets forth an action upon the bonds, and upon the bonds alone, and is not an action in tort against the county commissioners and the state's attorney coupled with an action in contract against the bondsmen. This matter, however, is immaterial to my dissent, as if the complaint states an action in tort coupled with an action in contract, as contended by the majority opinion, it is even more vulnerable to a demurrer than if an action upon the bonds alone. *Ghiradella v. Bourland*, 32 Cal. 585; *Teem v. Ellijay*, 89 Ga. 154, 15 S. E. 33; *Hoye v. Raymond*, 25 Kan. 665; *Rizer v. Davis County*, 48 Kan. 389, 29 Pac. 595.

I do not question for a moment that in a suit on a bond the principal may be joined with his sureties, nor the fact that a public official who gives separate and distinct bonds for the faithful performance of the same act may be sued on both bonds, and that in the same action the sureties on both of the bonds may be joined, and this because

all of the sureties have obligated themselves for the faithful performance of the same act and by the same principal. The most common example of these cases are those in which a public official has given a bond which is not considered to be sufficient in amount and an added and additional bond has been required. *Holeran v. School Dist.* 10 Neb. 406, 6 N. W. 472.

When we come to the objection, however, of the joinder of the causes of action against the bondsmen of each individual commissioner and against those of the state's attorney, we come to an entirely different proposition. It may be, as stated in 23 Cyc. 432, that "actions may be brought on distinct indemnity bonds, joining different sets of sureties, where the bonds *relate to the same* [subject] matters, and the rights and liabilities of *each set of* sureties depend upon those of the others." See also *Gilbert v. Board of Education*, 45 Kan. 31, 23 Am. St. Rep. 700, 25 Pac. 226. But we do not have any such a situation in the case which is before us. The bonds do not relate to the same subject-matters. Some are to guarantee the honesty of individual commissioners while in office and the fulfilment of their public duties, and one is to secure the like performance on the part of the state's attorney. No one bond guarantees or secures the honesty or performance of public duty on the part of all of the commissioners, and much less on the part of all of the commissioners and of the state's attorney also. The Code (Comp. Laws 1913, § 7466) expressly provides that causes of action cannot be united (except in actions to enforce mortgages) unless they "affect all the parties to the action," and if tort and contract or otherwise inharmonious causes of action are sought to be joined, unless "they also arise out of the same transaction, or transactions connected with the same subject of action." Will anyone contend that the contract of suretyship by which the defendants Wetzstein, Braun, Forster, and Kilzer undertook to stand good for the proper performance of official duty on the part of the commissioner Mischel, and which was executed on the 4th day of January, 1913, was a part of and connected with the same transaction as that wherein and on the 6th day of January, 1913, the defendants Peter F. and J. P. Berringer undertook to stand good and to be responsible for the proper performance of official duty on the part of the state's attorney? Can there be any pretense that the case at bar comes within the rule

laid down in 23 Cyc. 432, and that "the rights and liabilities of each set of sureties depend upon those of the others?" Suppose, for instance, one of the commissioners had strenuously objected to the payment to the state's attorney, and had voted against it, would anyone contend that his bondsmen could have been liable, or that their non-liability would absolve and release the bondsmen of another commissioner who had voted for and authorized the transaction?

The majority opinion has quoted the rule as laid down in 23 Cyc. 432. If the authors of that work are to be relied upon, there is another citation which is much more in point, and which is the only one applicable to the case at bar. It is to be found in 1 C. J. 1101, and is as follows: "Causes of action upon different official or indemnity bonds may be joined where the principal and sureties upon each bond are the same, and a common surety on different joint and several bonds may be joined in an action against the principal upon all of the bonds; but it is not permissible to join different causes of action against the different sureties or sets of sureties upon different bonds given to secure different duties or obligations, or, generally, where the bonds and the liabilities thereon are separate, distinct, and independent, as in the case of successive official bonds for different terms of office. Under some circumstances, however, causes of action upon different bonds with different sureties may be joined, as where the different bonds relate to the same matter and are similarly conditioned, and the default complained of constitutes a breach of each bond so as to render all of the sureties upon the different bonds liable therefor, as in the case of bonds given as additional security in regard to the same matter as an original bond which still remains in effect. A cause of action against the principal for a breach of the bond may be joined with the cause of action against the sureties thereon for the same breach; but a cause of action against the principal individually, which is not within the amount or conditions of the bond, cannot be joined with the cause of action against the sureties or principal and sureties on the bond."

It may also be that § 7407 of the Compiled Laws of 1913 provides that "persons liable severally for the same debt or demand, although upon different obligations or instruments, may all, or one or more of them, be included in the same action at the option of the plaintiff,"

but here we have no common claim or demand. The claim, in short, against the bondsmen of each of the several commissioners is and can be based upon their specific bonds alone. The bondsmen of the commissioners did not undertake to stand as sureties for the official conduct of the state's attorney, nor did those of the state's attorney agree to stand responsible for the misconduct of the respective commissioners. For these reasons I believe the demurrer should have been sustained. 1 C. J. 1101; 1 Enc. Pl. & Pr. 209; *Street v. Tuck*, 84 N. C. 605; *Pom. Code Rem.* 3d ed. § 482; *Cook v. Horwitz*, 10 Hun, 586, 588; *Dunson v. Nacogdoches County*, 15 Tex. Civ. App. 9, 37 S. W. 978; 1 *Phillips*, Code Pl. § 200.

I realize that much liberality has of late been shown in the construction of the Code of Civil Procedure, and so much so that the landmarks which formerly guaranteed an orderly and logical procedure are now almost obliterated. An examination of the authorities, however, will show that this, as far as misjoinder of actions and parties is concerned, has only been generally tolerated in suits in equity where the legally trained chancellor, with plenty of time in which to review the evidence, can, in a measure, be relied upon to distinguish the issues and the rights and liabilities of all of the parties to the proceedings. Our statute, also (*Comp. Laws* 1913, § 7466), seems to make it clear that such liberality, even in equitable actions, was only contemplated in the case of mortgages; and there is no authority for generally extending the rule, even to suits in equity. The language of the section is: "But the causes of action so united must all belong to one of these classes, and, except in actions for the foreclosure of mortgages, must affect all the parties to the action."

Be this as it may, the excuse for a departure from the established rules of pleading is not only not apparent in jury cases, but it is clear that such departure is fraught with the greatest danger. In the suit at bar there are four principals and the bondsmen on four distinct bonds. The rule applied by the majority opinion will be a precedent, and will apply in cases where there are twenty principals and a hundred bondsmen. Each principal and each bondsman may have a separate and a distinct defense—forgery, mistake of fact, cancelation, undue influence—a hundred different defenses. Yet all of these defenses and all of these issues must be presented to the same jury, which, un-

der the circumstances of the case, must, in a limited period of a few hours and in the confusion and Babel of voices of the jury room, determine and pass upon them all. I do not believe that the legislature ever intended such a practice.

Nor do I believe there is any merit in the suggestion of counsel for the plaintiff and respondent that the demurrer is joint and as such must be overruled if the complaint sets out a cause of action as to any demurrant, and that in the case at bar a cause of action is certainly alleged against some of the defendants. The Code especially provides that a misjoinder of parties which is apparent upon the face of the pleadings may be challenged by demurrer. (Comp. Laws 1913, § 7442.) The misjoinder affected all of the defendants equally, and the joint demurrer was therefore properly interposed.

Much less merit is there in the suggestion that the rule which is laid down in the case of *Purcell v. St. Paul F. & M. Ins. Co.* 5 N. D. 100, 64 N. W. 943, is here applicable, and which suggestion is to the effect that "special demurrers have been abolished in this state; and it is no longer a ground for demurrer under our procedure that the plaintiff has set forth two causes of action in his complaint, when his purpose is to recover only a single claim." In that case there were two causes of action, but a single defendant and a single claim. Here there are claims under separate and distinct bonds and against separate and distinct defendants. In the *Purcell* Case, also, the court added to the words quoted by counsel the clause: "It is not a failure to set forth a cause of action. Instead of that, the complaint states two causes of action." It is noticeable, indeed, and controlling that our Code (Comp. Laws 1913, § 7442), while, as to the cause of action, it only authorizes a demurrer when *no* cause of action whatever is set out, nevertheless specifically authorizes a demurrer in the case of a misjoinder of the parties, and this irrespective of the fact whether a cause of action is alleged against any of them or not.

I am of the opinion that the demurrer should have been sustained.

PRICE E. MORRIS v. OCCIDENT ELEVATOR COMPANY.

(157 N. W. 486.)

Complaint — first assailed — by general objection to evidence — trial court — all favorable presumptions indulged — construed as sufficient — when possible.

1. Where a complaint is assailed for the first time by a general objection upon the trial, every presumption will be indulged in favor of the pleading, and the pleading construed as sufficient, if it is reasonably possible to do so.

Trial court — complaint — construction of — answer — leave granted to amend — in conformity — cause — trial of — theory — defendant — appeal — cannot complain on.

2. Where the trial court places a certain construction upon a complaint, and the defendant asks for and obtains leave to amend his answer to conform to the trial court's construction, and the cause is tried upon such pleadings and such theory, the defendant cannot be heard to say on appeal that the trial court's construction and rulings made prior to the amendment of the answer were erroneous.

Goods sold — price or value — action to recover — burden of proof — contract of sale — terms thereof — price or value — delivery — acceptance — amount.

3. In an action to recover the price or value of goods sold, the burden is on the plaintiff to prove, among other things, the existence and validity of the contract of sale, and the terms thereof, the price or value, the delivery and acceptance of the goods, and the amount thereof.

Opinion filed March 20, 1916.

From a judgment and an order denying a motion for a new trial of the District Court of Foster County, *Coffey, J.*, defendant appeals.

Reversed.

Watson & Young and *E. T. Conmy*, for appellant.

The first requirement of a pleading is that it should be certain and definite, a statement of succinct and definite facts, in concise form, to the end that the defendant may be fully informed thereby of the true nature and extent of the cause of action against which he is called upon to defend. *Sutton v. Todd*, 24 Ind. App. 519, 55 N. E. 981.

The complaint must be framed upon a distinct theory. *Corbin Oil*

Co. v. Searles, 36 Ind. App. 215, 75 N. E. 294; Grøntner v. Fehrenschield, 64 Kan. 764, 68 Pac. 620; Clyde v. Johnson, 4 N. D. 96, 58 N. W. 512.

The complaint does not allege a sale nor a contract to sell the grain to defendant. 19 Enc. Pl. & Pr. 26.

"The sale and delivery, being the essential facts upon which the right of the plaintiff depends, should be distinctly averred." 35 Cyc. 551; 1 Chitty, Pl. 16th ed. 310; 9 Cyc. 712, 717, 718; Smith v. Perham, 33 Mont. 309, 83 Pac. 493; Re Columbus Buggy Co. 74 C. C. A. 611, 143 Fed. 861; Drudge v. Leiter, 18 Ind. App. 694, 63 Am. St. Rep. 359, 49 N. E. 34; Metropolitan Nat. Bank v. Benedict Co. 20 C. C. A. 377, 36 U. S. App. 604, 74 Fed. 182.

The averments of the complaint are more nearly in harmony with the theory of a bailment or agency, by which the defendant was to handle the grain for plaintiff. Gilman v. Gilby Twp. 8 N. D. 627, 73 Am. St. Rep. 791, 80 N. W. 889; Walker v. Butterick, 105 Mass. 237.

Plaintiff cannot recover, under the complaint, against defendant as agent, no negligence being claimed or shown. Walker v. McCaull, 13 S. D. 512, 83 N. W. 578; 19 Cyc. 143, 146; Brink v. Dolsen, 8 Barb. 337; Kane v. Cook, 8 Cal. 457.

No demand is alleged in the complaint. The law requires a demand upon an agent, before recovery can be had. Anderson v. Hulme, 5 Mont. 295, 5 Pac. 865; Burns v. Pillsbury, 17 N. H. 66; Kane v. Cook, 8 Cal. 457; Collin v. Burton, 3 Mo. 315; Baird v. Walker, 12 Barb. 298; Cooley v. Betts, 24 Wend. 203; Ferris v. Paris, 10 Johns. 285; 1 Estes, Pleadings & Forms, pp. 354, 355; Judah v. Dyott, 3 Blackf. 324, 25 Am. Dec. 112.

A question asked as to whether plaintiff sold the grain calls for a mere conclusion, and an objection thereto should be sustained. Rea v. Schow & Bros. 42 Tex. Civ. App. 600, 93 S. W. 707; Ward v. Dickson, 96 Iowa, 708, 65 N. W. 999; Norris v. Equitable Fire Asso. 19 S. D. 114, 102 N. W. 306; Thompson v. Brannon, 94 Ky. 490, 21 S. W. 1057; Shaw v. Gilmer, — Tex. Civ. App. —, 66 S. W. 679; Fred J. Kiesel & Co. v. Sun Ins. Office, 31 C. C. A. 515, 60 U. S. App. 10, 88 Fed. 249.

Testimony as to handling of the grain by defendant is competent,

under a general denial, as tending to show whether or not the transaction was a sale. *Alpert v. Bright*, 74 Conn. 614, 51 Atl. 521.

In an action for goods sold, in which defendant, under the general issue, endeavored to establish that he acted merely as a commission merchant, for plaintiff, the burden of proof as to such defense is not on defendant. *J. I. Case Plow Works v. Morris*, 17 Tex. Civ. App. 6, 42 S. W. 652; *Brown v. Holbrook*, 4 Gray, 102.

The burden of establishing a sale, or contract for a sale, of goods, is on plaintiff. He must prove all the essential elements, sale and delivery, acceptance, value, amount and price, terms, and conditions. *Ellerbee v. Cleveland*, 93 Ala. 591, 9 So. 619; *McWilliams v. Phillips*, 71 Ala. 80; *Jones*, Ev. 2d ed. pp. 204 et seq.; *Chittim v. Martinez*, 94 Tex. 141, 58 S. W. 948; *Burton v. Mason*, 26 Iowa, 393; *Ulmer v. McDonnell*, 11 N. D. 391, 92 N. W. 482.

Also, that the minds of the parties met. *Kelly v. Wheeler*, 22 S. D. 611, 119 N. W. 994; *Barton-Parker Mfg. Co. v. Taylor*, 78 Ark. 586, 94 S. W. 713; *Barney v. Fuller*, 133 N. Y. 605, 30 N. E. 1007; *Durgin v. Smith*, 133 Mich. 331, 94 N. W. 1045; *A. Hirschman Co. v. Kiewel*, 79 Minn. 239, 82 N. W. 574; *Weir v. Long*, 145 Ala. 328, 39 So. 974.

The burden is on plaintiff to establish a contract of sale, under his theory of the case, and if the evidence shows the contract to be one of agency, he cannot recover. *Alpert v. Bright*; *J. I. Case Plow Works v. Morris*; and *Brown v. Holbrook*,—*supra*; *Re Harris*, 214 Fed. 482; *Sioux Remedy Co. v. Lindgren*, 27 S. D. 123, 130 N. W. 50; *Gilman v. Gilby Twp.* 8 N. D. 627, 73 Am. St. Rep. 791, 80 N. W. 889; *Walker v. Butterick*, 105 Mass. 237; *Sturm v. Boker*, 150 U. S. 329, 37 L. ed. 1100, 14 Sup. Ct. Rep. 99; *Lenz v. Harrison*, 148 Ill. 598, 36 N. E. 567; *Union Stock-Yards & Transit Co. v. Western Land & Cattle Co.* 7 C. C. A. 660, 18 U. S. App. 438, 59 Fed. 49; *Ampel v. Seifert*, 84 N. Y. Supp. 123; *Ulmer v. McDonnell*, 11 N. D. 391, 92 N. W. 482.

Defendant fully complied with the contract; it used due care in the performance of its duties and paid over all proceeds from the sale of the grain, as provided by the contract. 40 Cyc. 429, 430; *Story*, *Bailm.* pp. 408, 409, 464, 465, 479; 31 Cyc. 1467; *Hopper v. Wells*, F. & Co. 27 Cal. 11, 85 Am. Dec. 211; *Christenson v. American Exp.* 33 N. D.—29.

Co. 15 Minn. 270, 2 Am. Rep. 122, Gil. 208; Teall v. Sears, 9 Barb. 320.

There is no evidence of negligence on the part of defendant. Story, Bailm. pp. 421, 422; Sigerson v. Pomeroy, 13 Mo. 620; Phillips v. Moir, 69 Ill. 156.

T. F. McCue, for respondent.

(Written brief, but no authorities cited).

CHRISTIANSON, J. In December, 1911, the plaintiff delivered to the defendant at its elevator at Sykeston, North Dakota, 1,130 bushels and 50 pounds of flaxseed. It is conceded that the plaintiff did not receive payment for $48\frac{3}{4}$ bushels of flax so delivered. The dispute arises over the terms of the oral agreement under which the flax was delivered. The plaintiff contends that the flax was delivered to the defendant under a contract of purchase and sale, and that the defendant purchased said flax, and agreed to pay plaintiff therefor the price per bushel that said flax would sell for in the market at Minneapolis, less the freight charges, inspection, storage, and commission. The defendant admits that it received the quantity of flax in question, but "denies that said flax was delivered to this defendant under a contract whereby defendant agreed to buy said flax, but alleges that said flax was delivered to this defendant by plaintiff under contract whereby defendant agreed to handle said flax for plaintiff by running said flax through the elevator and loading it on car to be transported to Minneapolis, there to be sold by said defendant as commission merchants for said plaintiff." The case was tried to a jury and resulted in a verdict in plaintiff's favor in the sum of \$89.30, with interest at 7 per cent from December 26, 1911. Judgment was entered pursuant to this verdict, and defendant appeals from the judgment and the order denying its motion for a new trial.

Appellant assails the sufficiency of plaintiff's complaint, and asserts that it is too uncertain and indefinite, and alleges neither a sale nor a contract to sell, and also fails to allege facts sufficient to show that plaintiff is entitled to recover from defendant as his agent or broker. No demurrer was interposed. Nor did defendant ask that the complaint be made more certain and definite. The complaint was assailed for the first time upon the trial by an objection to the introduction

of any evidence thereunder. This court has repeatedly held that a complaint challenged by such objection will be liberally construed and sustained if it is reasonably possible to do so. The complaint was somewhat vague, and there was some room for doubt as to whether it intended to charge a contract of sale or a contract of brokerage. If construed as charging a contract of brokerage or agency, it did not state a cause of action; but, if construed as charging a contract of sale, it stated a cause of action. The trial court properly adopted the construction which would sustain the pleading.

On cross-examination of plaintiff, defendant's counsel offered certain documentary evidence for the avowed purpose of showing that the agreement between plaintiff and defendant was not a contract of sale, but merely an agreement whereby defendant agreed to act as plaintiff's agent in disposing of the flax. In ruling on and sustaining the objection interposed to this evidence by plaintiff's counsel, the court said: "There is a general denial filed here to this complaint. The plaintiff claims the sale was made at the point of shipment. Of course, on that theory of the case it would not be material." Defendant asserts that this ruling was erroneous, and that such evidence was admissible under a general denial. It is unnecessary for us to consider the correctness of the ruling as the question is not before us. The record shows that immediately following such ruling, defendant's counsel asked for and obtained leave to amend the answer by setting up as a special defense that the defendant did not buy the flax from the plaintiff, but merely agreed to handle it for him as his agent. The answer was amended accordingly, and the trial proceeded upon the issues as framed by the amended answer. By acquiescing in the ruling and amending the answer in conformity therewith, defendant waived the error, if any. (Comp. Laws 1913, § 7250.) And as defendant was permitted to introduce, and did introduce, the evidence in question under the amended answer, it is obvious that it could not possibly be prejudiced by its exclusion under the former ruling.

We are, also, satisfied that there is no merit in appellant's assignments of error assailing the sufficiency of the complaint. As already stated, such question was first raised by a general objection upon the trial. Defendant's counsel acquiesced in the construction placed upon the complaint by the trial court, and amended the answer to conform

to said ruling; and the allegations in the amended answer, portions of which we have quoted above, were formulated on the theory that plaintiff's complaint alleged a contract of sale. The case was tried in the court below on this theory. No objection was made by defendant's counsel to the introduction of any of the evidence offered by plaintiff on the ground of variance. Under these circumstances it seems self-evident that defendant is in no position at this time to attack the complaint on the grounds that it is uncertain or indefinite, or that the evidence offered and received was variant therefrom.

Appellant also challenges the sufficiency of the evidence to sustain the verdict. This question was raised in the trial court both by motion for a directed verdict and by an alternative motion for judgment notwithstanding the verdict or a new trial. It is conceded that neither the complaint nor the proof justified a recovery against defendant as a broker, but that plaintiff must recover, if at all, upon a contract of sale. The question, therefore, is whether there is any substantial evidence tending to establish such contract. The plaintiff had the affirmative of the issue, and the burden was on him "to prove the existence and validity of the contract of sale, and the terms thereof, the price or value, the delivery and acceptance of the goods and the amount thereof, and his compliance with the contract, or a waiver of its provision by the buyer." 35 Cyc. 564. See also *Starke v. Stewart*, ante, 359, 157 N. W. 302.

The alleged contract rested in parol, and plaintiff in his direct examination testified in regard thereto as follows:

Q. Now, you may state what was said between yourself and the agent, Mr. Haven, with reference to this flax, what was done?

A. He was to put it in the cars and ship it to the Occident Elevator Company, run it through the house at 1 cent per bushel, he shipped it to the Occident Elevator Company, and I was to have,—

Q. Did you deliver the flax to the company there?

A. Yes, sir.

Q. Now, with reference to fixing the place, state whether or not you sold the flax to the elevator company at that time?

Mr. Merrell: Objected to as calling for a conclusion.

The Court: Overruled; calls for a conclusion of fact.

A. *I considered it virtually a sale; I was to pay the freight.*

Q. Was you to pay the freight, Mr. Morris; just give us what the agreement was?

A. I was to get the net price less the freight, 1 cent for running it through the house,—

Q. Now state,—

A. The commission charges.

Q. Proceed?

A. And what other incidental expenses that might be incurred.

Q. Now, in that oral talk that you had there, they were to pay you the Minneapolis price, market price for this grain?

A. Less these expenses.

Q. Less these expenses?

A. Yes, sir.

Q. Now, you may give the expenses?

A. Well, it was for putting it through the house.

Q. How much was that?

A. One cent per bushel.

Q. What else?

A. The freight expenses, 13 cents per hundred, I think.

Q. From Sykeston to Minneapolis?

A. From Sykeston to Minneapolis; the commission for selling.

Q. And the commission?

A. And what other, other few little incidental expenses.

The defendant's agent denied absolutely that he purchased the flax, and asserted that he merely agreed to handle the same and sell it for the plaintiff and account to him for the proceeds thereof. It is true, defendant's agent consigned the shipment as a shipment from defendant at Sykeston to itself at Minneapolis, but it is also true that defendant's agent sent the bill of lading for the car to the plaintiff, and the evidence, also, tends to show that the plaintiff took this bill of lading to a bank and drew a sight draft against the defendant for \$1,500, and that defendant paid such draft and received the bill of lading. Plaintiff's own testimony tends to establish a brokerage contract, rather than a sale.

In our opinion there is no substantial evidence tending to establish

the fact that plaintiff sold the flax to defendant. The judgment and order are therefore reversed, and the cause is remanded with directions that the trial court dismiss the action.

W. L. BRANTHOVER v. MONARCH ELEVATOR COMPANY,
a Foreign Corporation.

(156 N. W. 927.)

Thresher's lien — statement for — trial of filing — waiver of right to lien — estoppel.

1. Under § 6854, Comp. Laws 1913, which gives a thresher a lien upon the grain threshed "upon filing the statement provided for in the next section," and under the next section (§ 6855) which provides that such statement may be filed within thirty days after the completion of the work, it is held that a thresher who, before the filing of any such statement, goes with the owner of the grain to the elevator and stands by and remains silent while such owner sells the grain and receives payment therefor, is afterwards estopped from asserting any such lien against such elevator company.

Pleading — qualified general denial — conversion — estoppel or waiver — ownership of property — admission.

2. Where a qualified general denial is filed in an action for the conversion of property, and such denial merely denies the allegations of the complaint, except "as hereinbefore are specifically and in words admitted," and prior to such denial there is to be found in the answer a plea of estoppel or waiver which admits the ownership of the grain, such ownership will be deemed to be conceded by such denial.

Facts — issues — pleading — admitted — court — instructions as to — jury — practice.

3. Where facts and issues are admitted by the pleadings, the proper practice is for the court to instruct the jury as to the issues in the case and that such a fact has been admitted, rather than to allow the pleadings to be read in evidence to the jury or taken by them into the jury room.

Lien statement — person — property — grain — price — amount — description.

4. A lien statement is sufficient under § 6855, Comp. Laws, 1913, and sufficiently describes the person "for whom the threshing was done," which names the person with whom the contract was made and who had charge of the oper-

ations and of the land, even though his interest in a part of the land was joint. (Following *Dahlund v. Lorentzen*, 30 N. D. 275.)

Opinion filed February 28, 1916. Rehearing denied March 20, 1916.

Appeal from the County Court of Ransom County, *Thomas, J.* Action to enforce a thresher's lien. Judgment for plaintiff. Defendant appeals.

Reversed.

Rourke, Kvello, & Adams, for appellant.

The plea of estoppel in defendant's answer is good as against a demurrer. *Weber v. Lewis*, 19 N. D. 473, 34 L.R.A.(N.S.) 364, 126 N. W. 105.

Estoppel by silence arises where a person under the circumstances owes a duty to another to speak; his silence and his omission to speak lead the other to believe in the existence of a state of facts, and, relying thereon, may act adversely to his interests. 18 Cyc. 681; *Tobias v. Morris*, 126 Ala. 535, 28 So. 517; *Bigelow, Estoppel*, 588; 16 Cyc. 681 (10); *Sutton v. Consolidated Apex Min. Co.* 14 S. D. 33, 84 N. W. 211.

An admission in one defense cannot be used to destroy the effect of another defense, though the defenses pleaded are inconsistent. *Comp. Laws* 1913, § 7449; *Barr v. Hack*, 46 Iowa, 308; *Mt. Terry Min. Co. v. White*, 10 S. D. 620, 74 N. W. 1060; *Stebbins v. Lardner*, 2 S. D. 127, 48 N. W. 847; 1 *Elliott, Ev.* § 236 (138); *Eppinger v. Kendrick*, 5 Cal. Unrep. 295, 44 Pac. 234; *Barker v. Barth*, 192 Ill. 460, 61 N. E. 388.

The evidence does not establish the fact that the grain in question was grown and threshed on the land described in the lien. *Martin v. Hawthorne*, 5 N. D. 66, 63 N. W. 895.

Butler & Thompson, for respondent.

A person sought to be estopped must have had the intention of influencing the person who acted on and by reason of his conduct. There must have been present some element of deception. *Parlman v. Young*, 2 Dak. 175, 4 N. W. 139, 711.

Defendant knew that plaintiff had the statutory period after the threshing was completed in which to claim his right and file his lien. Code, §§ 6588, 6855; *Knauf & T. Co. v. Elkhart Sand & Gravel Co.*

48 L.R.A.(N.S.) 775, note 2; Sutton v. Consolidated Apex Min. Co. 14 S. D. 33, 84 N. W. 211; Mitchell v. Monarch Elevator Co. 15 N. D. 495, 107 N. W. 1085, 11 Ann. Cas. 1001.

A general denial does not compel the plaintiff to prove admitted material facts, even though such admissions occur in a part of the answer where a separate defense is pleaded. Gale v. Shillock, 4 Dak. 182, 29 N. W. 661.

Even where such admission is made in the answer to gain some advantage to the pleader, the adverse party should not be required to prove the very facts admitted. Johnson v. Butte & S. Copper Co. 41 Mont. 158, 48 L.R.A.(N.S.) 938, 108 Pac. 1057; Mattoon v. Fremont, E. & M. Valley R. Co. 6 S. D. 301, 60 N. W. 69.

The contract was made for the threshing with the party who was in possession of the grain threshed. The evidence shows that defendant purchased grain from such party that fall. Dahlund v. Lorentzen, 30 N. D. 275, 152 N. W. 684.

BRUCE, J. This is an action for the conversion of grain, the plaintiff claiming under a thresher's lien, the purchase and subsequent selling of the grain by the elevator and the demand and refusal being admitted.

The first question to be decided is: Did the plea of estoppel state, and would the proof offered under it but denied admission have shown, an estoppel? This question we answer in the affirmative. The plea was as follows: "The defendant further alleges that prior to the filing of the alleged lien mentioned in the complaint the plaintiff and one Charles Chisman, the legal owner of said grain, came together to the defendant's elevator, at Lisbon, North Dakota, to make settlement with the defendant for the grain described in the complaint; that the defendants then and there, in the presence and with the silent acquiescence and consent of the plaintiff, settled with and paid over to the said Charles Chisman, nine hundred and forty dollars (\$940), the proceeds of said grain and every part thereof; that the plaintiff did not then or at any time disclose to the defendant that he had any interest in or lien upon said grain, or any part of or parcel thereof, and thereby misled the defendant by his silence and conduct to his prejudice and loss, and thereby caused the defendant to believe that said grain was free

from any claim or lien upon the same on behalf of the plaintiff, by reason of which silence, conduct, and behavior the plaintiff ought to be estopped to assert any right, title, interest, or lien in or upon said grain or any part thereof."

The offer of proof was: "The defendant offers to show by this witness that, prior to the filing of the alleged lien mentioned in the complaint, the plaintiff and one Charles Chisman, the legal owner of the grain in question, came to the defendant's elevator at Lisbon, North Dakota, to make settlement for the grain described in the complaint which had previously been delivered to said elevator; that the defendant then and there, in the presence of and with the silent acquiescence of the plaintiff, settled with and paid over to Charley Chisman the sum of \$940, the proceeds of said grain and every part thereof; that the plaintiff did not then or at any time disclose to the defendant that he had any interest in or lien upon said grain, or any part or parcel thereof, and thereby misled the defendant by his conduct, to its prejudice and loss, and thereby causing the defendant to believe that the grain was free and clear of any claim or lien upon the same upon behalf of the plaintiff, by reason of which silence, conduct, and behavior the plaintiff ought to be estopped from asserting any right or interest in the said grain to the damage of the defendant."

The reason given by the trial judge for holding that the plea did not state facts sufficient to constitute an estoppel, and for refusing the proffered offer of proof, was that he was "of the opinion that where a party against whom an estoppel is claimed has his title of record or the party claiming the estoppel against him has notice of his rights by virtue of the law, that the mere silence of the party against whom the estoppel is attempted to be asserted and no active conduct which is liable to mislead the adverse party is alleged, that no estoppel arises."

It is admitted that at the time of the delivery and settlement for the grain in question, no thresher's lien had been filed or recorded. It is clear, however, that the law gave the plaintiff (the thresher) thirty days after the doing of the work in which to file his lien; that the work was completed by September 6th, and the lien filed on September 17th, and the settlement made and the grain sold on September 2d and before all of the work had been completed. Defendant, therefore, had no record notice of plaintiff's claim. He must be presumed to have

known, however, that if the owner had not paid for the threshing or secured the payment of the same in some way, the thresher had an inchoate lien for his work and thirty days during which to complete and file it. See § 6855 of the Compiled Laws of 1913. *Mitchell v. Monarch Elevator Co.* 15 N. D. 495, 107 N. W. 1085, 11 Ann. Cas. 1001.

We are of the opinion that the court erred in holding that an estoppel was not pleaded and in rejecting the proffered offer of proof. Estoppel is fundamentally and primarily based upon the duty to speak, and upon the equitable idea that "he who is silent when conscience requires him to speak shall be debarred from speaking when conscience requires him to keep silent." 16 Cyc. 681. " 'Estoppel by silence' arises where a person who, by force of circumstances is under a duty to another to speak, refrains from doing so and thereby leads the other to believe in the existence of a state of facts in reliance upon which he acts to his prejudice." 16 Cyc. 681. "From total but misleading silence with knowledge, or passive conduct joined with a duty to speak, an estoppel will arise. The case must be such that it would be fair to equate the silence with a declaration of the party that he has no interest in the subject of the transaction. Indeed, silence, when resulting in an estoppel, may not improperly be said to have left something like a representation upon the mind; for the case is this: A negotiation is going on, and the mind receives the facts brought out, and receives those facts only. Hence, everything inconsistent with them, relating to the rights of others present as well as to those of the party with whom the negotiation is going on, is excluded. The effect no doubt is negative, but the mind goes wrong because of that negative; and the silence certainly affects the matter of calculating the advantages of the proposal." Bigelow, Estoppel, 648.

"To make the silence of a party operate as an estoppel the circumstances must have been such as to render it his duty to speak. It is essential that he should have had knowledge of the facts, and that the adverse party should have been ignorant of the truth and have been misled into doing that which he would not have done but for such silence. In other words, when the silence is of such a character and under such circumstances that it would become a fraud upon the other party to permit the party who has kept silent to deny what his silence has

induced the other to believe and act upon it will operate as an estoppel." 16 Cyc. 759. "The true test is whether or not the circumstances are such as to impose upon one in equity and good conscience the duty to speak. As to when this duty devolves, there is not and from the nature of the case cannot be any established or uniform rules. It depends to a great extent upon the circumstances attending each particular case, and it is rare that two are alike. Generally speaking, if a person is present at the time of a transaction, he must speak, or he will be estopped. If absent, his silence or other conduct must at least be of a nature to have an obvious and direct tendency to cause the omission or the step taken." 16 Cyc. 760. See also 10 R. C. L. 692.

Applying these principles to the case at bar, we have no hesitation in holding that the plea pleaded and the proffered proof would have shown an estoppel.

The threshing, it is true, had not all been done, but no lien had been filed or recorded and the elevator had no record notice. It was merely conversant of the fact that if the threshing bill had not been paid or secured, and the grain had not been released, an inchoate right to a lien existed. Under these circumstances the holder of that alleged inchoate lien comes to the elevator with the owner of the grain. He says nothing about his lien. He stands by and allows the owner to receive the full price of the grain, and, if there was a lien, to perpetrate a fraud upon the elevator company; in other words, to sell for its full price that which he knew was subject to a lien, and not of that value, and perhaps of no value at all. This very bystander—this co-conspirator, in short—now comes into a court of justice and seeks to assert his alleged lien. He was silent when conscience required him to speak, and he should now be debarred from speaking when conscience requires him to keep silent. The case is no different than one in which "one who owns or has an interest in personal property, with full knowledge of his rights, suffers another to deal with it as his own by selling or pledging it [or mortgaging] or otherwise disposing of it." In such a case there can be no doubt that an estoppel exists. 16 Cyc. 762, 764, and cases cited.

We are not unaware of the case of *Mitchell v. Monarch Elevator Co.* 15 N. D. 495, 107 N. W. 1085, which is cited by counsel for respondent, and which quite liberally construes, and in favor of the

lienor, the statute under consideration. The case, however, is not in point here, as no element of estoppel was involved.

The next point to be considered is defendant's contention that the court erred in admitting in evidence the plea of estoppel contained in the third paragraph of defendant's answer, and "as an admission proving the identity of the grain in question." He maintains that inconsistent pleas may be pleaded under the construction which has been given to our Code, and that this benefit is denied if an admission in one plea can be used to destroy the effect of another.

The first paragraph of the complaint alleged that the defendant was a foreign corporation. The second alleged that the plaintiff had a special property and ownership in the grain and the right of immediate possession under a thresher's lien, that the threshing was done for one Charlie Chisman upon certain described premises, and that such Chisman was the owner of the grain.

The answer admitted the first paragraph of the complaint, that is to say, that the defendant was a foreign corporation. It admitted that an alleged lien had been filed. It then proceeded as follows:

"The defendant further alleges that prior to the filing of the alleged lien mentioned in the complaint, the plaintiff and one Charles Chisman, the legal owner of said grain, came together to the defendant's elevator, at Lisbon, North Dakota, to make settlement with the defendant for the grain described in the complaint; that the defendants then and there, in the presence and with the silent acquiescence and consent of the plaintiff, settled with and paid over to the said Charles Chisman nine hundred and forty dollars, the proceeds of said grain and every part thereof; that the plaintiff did not then or at any time disclose to the defendant that he had any interest in or lien upon said grain, or any part of or parcel thereof and thereby misled the defendant by his silence and conduct to his prejudice and loss, and thereby caused the defendant to believe that said grain was free from any claim or lien upon the same on behalf of the plaintiff, by reason of which silence, conduct, and behavior the plaintiff ought to be estopped to assert any right, title, interest, or lien in or upon said grain or any part thereof.

"Further answering, the defendant denies each and every allegation,

matter, and thing in said complaint contained, except such as hereinbefore are specifically and in words admitted."

It will be seen from the above that the answer contained a plea of waiver or estoppel and a qualified general denial. It is well established that "a qualified general denial must be taken for what it says, and certainly cannot overcome positive and unequivocal admissions contained in other paragraphs of the answer." *Kennedy v. Dennstadt*, 31 N. D. 422, 154 N. W. 271.

In the case at bar the admission in the plea of estoppel was binding upon the plaintiff in so far as the ownership in Chisman of the grain was concerned, as this fact was clearly admitted by the words of the plea.

In passing upon this matter, however, the court wishes to outline what it believes to be the proper method of procedure in such a case. Much confusion arises from the practice of allowing the jury to take the pleadings into the jury room or of reading them aloud in the court room. Juries are not learned in the law, nor in legal verbiage, and will rarely center their attention on the particular point or paragraph involved. The practice, therefore, should be for the court in its charge to clearly define the issues, and, if a fact is admitted by the pleadings, to instruct the jury that it is so admitted, rather than to allow the pleadings to be read aloud or the jury to take them into the jury room. *Mt. Terry Min. Co. v. White*, 10 S. D. 620, 74 N. W. 1060.

As a new trial will probably result from this decision, it is necessary to pass upon yet another proposition, but this time adversely to the defendant and appellant. "The evidence," defendant asserts in his brief, "clearly establishes the fact that Chisman had but a small interest in the lands described in the threshers' lien; that he had a partner Quall in most of his farming transactions; that the thresher's lien refers only to Chisman as the owner and custodian; that the evidence in no way identifies the grain in controversy with the grain threshed on the quarter section in which Chisman alone had an interest, nor is the grain in controversy identified with the grain grown on the lands in which Chisman and Quall had a partnership interest. From these premises he argues that the notice of thresher's lien was not sufficiently definite.

Counsel, however, is in error in this respect. The proof, as we read

it, shows that the grain was grown either on the quarter section owned by Chisman alone or on that owned by him jointly with Quall, and that he had charge of the threshing operations on both pieces of land. This being the case, and under our recent holding in *Dahlund v. Lorentzen*, 30 N. D. 275, 152 N. W. 684, the notice of lien was sufficiently definite.

For the errors previously mentioned, however, the judgment of the County Court is reversed and a new trial is ordered.

On Petition for Rehearing.

BRUCE, J. A petition for a rehearing has been filed in which the subject of estoppel is somewhat technically discussed. It is, however, unnecessary for us to determine whether in the case at bar there was a technical estoppel or not. It is sufficient to say that there was a clear waiver of any lien or inchoate right to a lien, and that this is sufficient to defeat plaintiff's claim.

The petition for a rehearing is denied.

BOARD OF EDUCATION of the City of Rugby, a Municipal Corporation, and O. L. Casady as Treasurer of the Board of Education of Said Corporation, v. HENRY NELSON, F. T. Gronvold, and A. H. Jones.

(157 N. W. 664.)

Action at law — school district — treasurer — official bond — sureties — loss — depositary — bank — failure of — liability of treasurer — deposits — made under order of board.

1. Action at law to recover of the Rugby School District treasurer and sureties on his official bond for a balance of \$2,521 and interest, lost by the district through the failure of its depositary, the defunct First National Bank of Rugby. *Held*: That the treasurer in depositing the school funds therein upon order of the district board, and in compliance with the statutes, is not liable upon his official bond where the school funds are lost to the district.

School board — depositaries — designation of — duty and province — bonds.

2. The designation of depositaries, and requiring of bonds from them, was the duty and province of the school board, not the treasurer.

School board — compliance with law — treasurer — may assume — deposits — bonds.

3. Under the record the treasurer was justified in assuming that the board had complied with the law in the designating of depositaries, and had exacted sufficient depositary bonds.

Designation of depositary — continues.

4. The original designation of depositaries in 1905 was sufficient to continue said bank as a legal depositary and without a redesignation in July, 1907.

Sinking fund — loss of — deposit — order of board — made under — bank once designated — treasurer — may presume continuance.

5. The loss arises principally from the deposit of a sinking fund as to which the school board is empowered to order a deposit to be made in any depositary therefor and, which depositary may be designated after advertisement and at any time. The treasurer had the right to rely upon the presumption that said bank had been designated as a depositary for such funds.

School treasurer — control of funds — limited — board selects depositaries — school funds — authority over — with school boards — treasurer — not insurer — exonerated.

6. School treasurers have not the control of the district funds except in a limited way for the purpose of depositing them in depositaries selected by the board. The authority over school funds is with the district board since the enactment of depositary statutes; and since which time the treasurer is no longer an insurer of the return of school funds to the district after their deposit as provided by law. The facts exonerate the treasurer and his bondsmen from liability.

Opinion filed March 24, 1916.

An appeal from a judgment of the District Court of Pierce County, Burr, J., dismissing this action.

Affirmed.

Campbell & Jongewaard, for appellants.

The school board, under the law, had the power and it was its duty to designate depositaries where school funds could be deposited by the district treasurer. Such a designation was made in 1905, and bank designated, gave a bond as provided by law. Does such designation exempt the treasurer elected in 1908 and his bondsmen from liability?

"All funds shall be deposited by the treasurer in such bank or banks as shall have been designated, in accordance with this article, as hereinafter provided." Comp. Laws 1913, § 1472.

The school board shall make such designation in July of each odd-numbered year, and the clerk shall advertise for proposals. Comp. Laws 1913, §§ 1473, 1474, 1476-1482, 1485, 1486.

The matter of designating depositaries and of making deposits of school funds is largely if not wholly governed by statute, and it is indeed questionable if the designation of depositaries for 1905 continues over and includes 1907. 13 Cyc. 1813 et seq.

The law has manifested an intent to guard with utmost care the funds, and to hold the treasurer to strict accountability. Comp. Laws 1913, §§ 1165, 1166, 1171, 1218, 1347, 1352, 1472, 1477, 1481, 1482, 1485, 1488, *supra*; Mecklenburg County v. Beales, 111 Va. 691, 36 L.R.A.(N.S.) 289, 69 S. E. 1032; 13 Cyc. 814, note 70; State ex rel. Kuhlemeier v. Rhein, 149 Iowa, 76, 127 N. W. 1079, and cases cited; Van Vlissingen v. Clay County, 54 Minn. 555, 56 N. W. 252; State ex rel. Irrigators' Bank v. Whipple, 60 Neb. 650, 83 N. W. 921; Manitowoc County v. Truman, 91 Wis. 1, 64 N. W. 307; State ex rel. Roberts v. Lawrence, 80 Kan. 707, 103 Pac. 839; Schouweiler v. Allen, 17 N. D. 510, 117 N. W. 866; Corey v. Hunter, 10 N. D. 5, 84 N. W. 570; Treadway v. Schnauber, 1 Dak. 236, 46 N. W. 464; 20 Am. & Eng. Enc. Law, 1142, 1183, 1184, 1209, 1210, 1217; 25 Am. & Eng. Enc. Law, 59; Mechem, Agency, 273, 276, 291, 292.

The treasurer can only deposit on the terms and conditions of the statute. Mecklenburg County v. Beales, 36 L.R.A.(N.S.) 285, and note; Wilson v. People, 22 L.R.A. 449, note.

He is exempted from liability only upon compliance with the statute. State v. United States Fidelity & G. Co. 81 Kan. 660, 26 L.R.A.(N.S.) 865, 106 Pac. 1040; 13 Cyc. 813-815, and cases cited; Van Vlissingen v. Clay County, 54 Minn. 555, 56 N. W. 252; St. Louis County v. American Loan & T. Co. 75 Minn. 489, 78 N. W. 113; St. Louis County v. American Loan & T. Co. 67 Minn. 112, 69 N. W. 704; St. Louis County v. Security Bank, 75 Minn. 174, 77 N. W. 815.

The law, requiring the board to advertise for bids for depositaries, is

mandatory, and all acts done without compliance with the statute are illegal. Comp. Laws 1913, §§ 1473, 1474.

The legislature did not intend a "continuance" or "holding over" of a depositary, merely because once designated. There is a marked distinction between public and private bonds, the rules and principles applicable to the former, not the latter, are applicable here. *Mecklenburg County v. Beales*, 111 Va. 691, 36 L.R.A.(N.S.) 285, 69 S. E. 1032; *Throop*, Pub. Off. 202, 203; *St. Louis County v. Security Bank*, 75 Minn. 174, 77 N. W. 815.

It cannot be said that one holds over, without express, unequivocal expression to that effect by the legislature. 13 Cyc. 812, 813; *Throop*, Pub. Off. 308, 323; *Territory ex rel. Peterson v. Hauxhurst*, 3 Dak. 205, 14 N. W. 432; *State ex rel. Wood v. Sheldon*, 8 S. D. 525, 67 N. W. 613; *State ex rel. Wood v. Smedley*, 8 S. D. 531, 67 N. W. 1151; *State ex rel. Lavin v. Bacon*, 14 S. D. 284, 85 N. W. 225; *Re Supreme Ct. Vacancy*, 4 S. D. 532, 57 N. W. 495.

The contract of the sureties is strictly construed in favor of the sureties, to impose upon the sureties only those burdens clearly within its terms. 32 Cyc. 73; *St. Louis County v. Security Bank*, 75 Minn. 174, 77 N. W. 815; *Fremont County v. Fremont County Bank*, 138 Iowa, 167, 115 N. W. 928; *Baker City v. Murphy*, 30 Or. 405, 35 L.R.A. 88, 42 Pac. 133; *Throop*, Pub. Off. 205, 207, 212, 213, 339.

The presumption that officers perform their duties is in any event a mere rebuttable presumption. To hold here that defendant had a right to believe and act upon such presumption from the evidence offered, and to take it for granted that the officers had performed all precedent and mandatory conditions, would be to make such presumption conclusive.

The purpose of the law is to bind and estop the district and make it answerable for the acts, or failure to act, of the board and clerk. Rev. Codes 1905, §§ 7315, 7317, Comp. Laws 1913, §§ 7934, 7936; 22 Am. & Eng. Enc. Law, 1270; 11 Am. & Eng. Enc. Law, 434; *Goose River Bank v. Willow Lake School Twp.* 1 N. D. 26, 26 Am. St. Rep. 605, 44 N. W. 1002; *St. Louis County v. Security Bank*, 75 Minn. 174, 77 N. W. 815; *State v. United States Fidelity & G. Co.* 81 Kan. 660, 26 L.R.A.(N.S.) 865, 106 Pac. 1040; *Capital Bank v. School Dist.* 1 N. D. 479, 48 N. W. 363; *Engstad v. Dinnie*, 8 N. D. 12, 33 N. D.—30.

76 N. W. 292; *State v. School Dist.* 18 N. D. 616, 138 Am. St. Rep. 787, 120 N. W. 555; *National L. Ins. Co. v. Mead*, 13 S. D. 37, 48 L.R.A. 785, 79 Am. St. Rep. 876, 82 N. W. 78; *Flagg v. School Dist.* 4 N. D. 45, 25 L.R.A. 363, 58 N. W. 499; *National L. Ins. Co. v. Board of Education*, 10 C. C. A. 637, 27 U. S. App. 244, 62 Fed. 778; *Board of Education v. McLean*, 45 C. C. A. 658, 106 Fed. 817.

To sustain defendants here would be to lay down the rule that the public is estopped to show its agent had no authority by the unauthorized act itself to bind it and make it answerable for unauthorized acts of other public agents. *Smith v. Lawrence*, 2 S. D. 185, 49 N. W. 7; *Flagg v. School Dist.* 4 N. D. 30, 25 L.R.A. 363, 58 N. W. 499; *Coler & Co. v. Dwight School Twp.* 3 N. D. 249, 28 L.R.A. 649, 55 N. W. 587; *Billingsley v. Hiles*, 6 S. D. 445, 61 N. W. 687; *National L. Ins. Co. v. Mead*, 13 S. D. 37, 48 L.R.A. 785, 79 Am. St. Rep. 876, 82 N. W. 78; *Meyer v. School Dist.* 4 S. D. 420, 57 N. W. 68; *Rev. Codes 1905*, §§ 923, 927, 7300, 7301, *Amended 1907*, *Comp. Laws 1913*, §§ 1475, 1479, 7919, 7920; *Emmons County v. First Nat. Bank*, 9 N. D. 591, 84 N. W. 379; *Rochford v. School Dist.* 19 S. D. 435, 103 N. W. 763; *State, Durant, Prosecutor, v. Jersey City*, 25 N. J. L. 309; 25 Am. & Eng. Enc. Law, 43; *Hinton v. School Dist.* 12 Kan. 573; 20 Am. & Eng. Enc. Law, 1214; *Galvin v. Tibbs, H. & Co.* 17 N. D. 600, 119 N. W. 39; *State v. Flagstad*, 25 S. D. 337, 126 N. W. 585; *State v. Gottlieb*, 21 N. D. 179, 129 N. W. 460; *Goss v. Herman*, 20 N. D. 295, 127 N. W. 78; 30 Am. & Eng. Enc. Law, 90; *Fisher v. Betts*, 12 N. D. 197, 96 N. W. 132; *Sykes v. Beck*, 12 N. D. 242, 96 N. W. 844; *State v. Callahan*, 18 S. D. 150, 99 N. W. 1100; *Yokell v. Elder*, 20 N. D. 142, 127 N. W. 514; *Holtan v. Beck*, 20 N. D. 5, 125 N. W. 1048; *Strecker v. Railson*, 16 N. D. 68, 8 L.R.A.(N.S.) 1099, 111 N. W. 612; *Putnam v. Custer County*, 25 S. D. 542, 127 N. W. 641; *Amundson v. Wilson*, 11 N. D. 193, 91 N. W. 37; *McManus v. Commow*, 10 N. D. 340, 87 N. W. 8; *Garland v. Foster County State Bank*, 11 N. D. 374, 92 N. W. 452; *Howser v. Pepper*, 8 N. D. 484, 79 N. W. 1018; *Pickton v. Fargo*, 10 N. D. 469, 88 N. W. 90; *Lee v. Crawford*, 10 N. D. 482, 88 N. W. 97; *Eaton v. Bennett*, 10 N. D. 346, 87 N. W. 188; *Sheets v. Paine*, 10 N. D. 103, 86 N. W. 117; *Mears v. Smith*, 19 S. D. 79, 102 N. W. 295; *Taughner v. Northern P. R. Co.* 21 N. D. 111, 129 N. W. 747; *Brynjolfson v. Dagner*, 15 N. D.

332, 125 Am. St. Rep. 595, 109 N. W. 320; Enderlin Invest. Co. v. Nordhagen, 18 N. D. 517, 123 N. W. 390; 25 Am. & Eng. Enc. Law, 962-964; Brown v. Bon Homme, 1 S. D. 216, 46 N. W. 173; 17 Cyc. 507.

The board and clerk are mere public agents. 20 Am. & Eng. Enc. Law, 1209, 1210, 1217; Schouweiler v. Allen, 17 N. D. 510, 117 N. W. 866; Gordon v. Vermont Loan & T. Co. 6 N. D. 454, 71 N. W. 556.

One dealing with an agent must ascertain his authority, and in this respect acts at his peril. Mechem, Agency, 273, 276, 291, 292; Corey v. Hunter, 10 N. D. 5, 84 N. W. 570; 20 Am. & Eng. Enc. Law, 1142, 1183, 1184; National L. Ins. Co. v. Mead, 13 S. D. 37, 48 L.R.A. 785, 79 Am. St. Rep. 876, 82 N. W. 78, 13 S. D. 342, 83 N. W. 335; Board of Education v. McLean, 45 C. C. A. 658, 106 Fed. 817; 22 Am. & Eng. Enc. Law, 1184, 1270; Swift v. Williamsburgh, 24 Barb. 427; Johnson v. Indianapolis, 16 Ind. 227.

One cannot refuse obedience, and not comply with an order or direction or mandate, and then assert it as a defense. 31 Cyc. 1451; Rev. Codes 1905, §§ 930, 936, 5773; Comp. Laws 1913, §§ 1482, 1488, 6341; 1 Am. & Eng. Enc. Law, 2d ed. 1058; Kennedy v. State Bank, 22 N. D. 69, 132 N. W. 657; Queen City F. Ins. Co. v. First Nat. Bank, 18 N. D. 603, 22 L.R.A.(N.S.) 509, 120 N. W. 545.

A board can only act as such at a proper meeting.

The evidence does not show a meeting or a record of one held for the purpose of making such deposit designation. The evidence in this respect shows merely an order, not a resolution nor public record. Rev. Codes 1905, §§ 808, 810, 906, Comp. Laws 1913, §§ 1162, 1164, 1353; 20 Am. & Eng. Enc. Law, 1210, 1212; 23 Am. & Eng. Enc. Law, 589; 25 Am. & Eng. Enc. Law, 56; Emmons County v. First Nat. Bank, 9 N. D. 583, 84 N. W. 379; Rochford v. School Dist. 19 S. D. 435, 103 N. W. 763; O'Neil v. Tyler, 3 N. D. 47, 53 N. W. 434; State ex rel. Moore v. Archibald, 5 N. D. 359, 66 N. W. 234.

One has the right to cross-examine his own witness when for the first time, and on the witness stand, he displays hostility. 40 Cyc. 2559, 2560, 2476, note 33.

The legislature has made its orders and commands *direct* to the treasurer, and no other authority or power is given to any one, to control the acts of the treasurer. 13 Cyc. 813, and cases cited, 814 and note;

Van Vlissingen v. Clay County, 54 Minn. 555, 56 N. W. 252; State ex rel. Irrigators' Bank v. Whipple, 60 Neb. 650, 83 N. W. 921; State ex rel. Kuhlemeier v. Rhein, 149 Iowa, 76, 127 N. W. 1079; Comp. Laws 1913, §§ 1472, 1477, 1481, 1482, 1485, 1486, 1488.

The statutes to which reference has been made, and especially the word "shall" as there used, are mandatory. State ex rel. Roberts v. Lawrence, 80 Kan. 707, 103 Pac. 839; Van Vlissingen v. Clay County, 54 Minn. 555, 56 N. W. 252; Manitowoc County v. Truman, 91 Wis. 1, 64 N. W. 307; 13 Cyc. 814, notes 71, 72 and 76, 815, note 84 and cases cited; 21 Am. & Eng. Enc. Law, 1214; Bosard v. Grand Forks, 13 N. D. 587, 102 N. W. 164; 30 Am. & Eng. Enc. Law, 90, 91; Amundson v. Wilson, 11 N. D. 193, 91 N. W. 37; Putnam v. Custer County, 25 S. D. 542, 127 N. W. 641; 22 Am. & Eng. Enc. Law, 1270; Pickton v. Fargo, 10 N. D. 469, 88 N. W. 90; O'Neil v. Tyler, 3 N. D. 47, 53 N. W. 434; 28 Cyc. 344; 4 Am. & Eng. Enc. Law, 606; 20 Am. & Eng. Enc. Law, 1141, 1142, 1157, 1162, 1164, 1165, 1167, 1168, 1174, 1210, 1214, 1217; 23 Am. & Eng. Enc. Law, 365; 25 Am. & Eng. Enc. Law, 34, notes 6, 9, 10, 13, 41, 42; Goose River Bank v. Willow Lake School Twp. 1 N. D. 26, 26 Am. St. Rep. 605, 44 N. W. 1002; Stern v. Fargo, 18 N. D. 289, 26 L.R.A.(N.S.) 665, 122 N. W. 403; Hughes v. Horsky, 18 N. D. 474, 122 N. W. 799; State v. School Dist. 18 N. D. 616, 138 Am. St. Rep. 787, 120 N. W. 555; Bosard v. Grand Forks, 13 N. D. 587, 102 N. W. 164; Sheets v. Paine, 10 N. D. 103, 86 N. W. 117; Engstad v. Dinnie, 8 N. D. 1, 76 N. W. 292; Roberts v. Fargo, 10 N. D. 239, 86 N. W. 726; Sim v. Rosholt, 16 N. D. 77, 11 L.R.A.(N.S.) 372, 112 N. W. 50; Alstad v. Sim, 15 N. D. 629, 109 N. W. 66; Baker v. La Moure, 21 N. D. 140, 129 N. W. 464; Emmons County v. First Nat. Bank, 9 N. D. 591, 84 N. W. 379; State ex rel. Laird v. Gang, 10 N. D. 331, 87 N. W. 5; Capital Bank v. School Dist. 1 N. D. 490, 48 N. W. 363; Gull River Lumber Co. v. School Dist. 1 N. D. 500, 48 N. W. 427; Brown v. Bon Homme County, 1 S. D. 216, 46 N. W. 173; Graves v. Jasper School Twp. 2 S. D. 414, 50 N. W. 904; Milbank v. Western Surety Co. 21 S. D. 261, 111 N. W. 561; Huston v. Sioux Falls Twp. 17 S. D. 260, 96 N. W. 88; State ex rel. La Follette v. Chicago, M. & St. P. R. Co. 16 S. D. 517, 94 N. W. 406; Whittaker v. Deadwood, 23 S. D. 538, 139 Am. St. Rep. 1076, 122 N. W. 590; Hardy v. Purington, 6 S. D. 382,

61 N. W. 158; Van Vissingen v. Clay County, 54 Minn. 555, 56 N. W. 252; St. Louis County v. American Loan & T. Co. 67 Minn. 112, 69 N. W. 704; St. Louis County v. American Loan & T. Co. 75 Minn. 489, 78 N. W. 113.

The board can only act as such at a regular meeting, or at a special meeting properly called. 20 Am. & Eng. Enc. Law, 1210, 1212; 23 Am. & Eng. Enc. Law, 56, 366; Emmons County v. First Nat. Bank, 9 N. D. 583, 84 N. W. 379; Rochford v. School Dist. 19 S. D. 435, 103 N. W. 763; O'Neil v. Tyler, 3 N. D. 47, 53 N. W. 434; State ex rel. Moore v. Archibold, 5 N. D. 359, 66 N. W. 234; State, Durant, Prosecutor, v. Jersey City, 25 N. J. L. 309; 25 Am. & Eng. Enc. Law, 42.

Defects in the record cannot be cured by evidence *aliunde*. Lee v. Crawford, 10 N. D. 482, 88 N. W. 97; Eaton v. Bennett, 10 N. D. 346, 87 N. W. 188; Sheets v. Paine, 10 N. D. 103, 86 N. W. 117; Pickton v. Fargo, 10 N. D. 469, 88 N. W. 90; O'Neil v. Tyler, 3 N. D. 47, 53 N. W. 434; 20 Am. & Eng. Enc. Law, 1214; Coler & Co. v. Dwight School Twp. 3 N. D. 249, 28 L.R.A. 649, 55 N. W. 587; 28 Cyc. 344; 17 Cyc. 507.

The public cannot be estopped where a public record is provided for and required, and one is bound to ascertain both fact and extent of agency. Mechem, Agency, 273, 276, 291, 292; Corey v. Hunter, 10 N. D. 5, 84 N. W. 570; 11 Am. & Eng. Enc. Law, 434; Engstad v. Dinnie, 8 N. D. 12, 76 N. W. 292; Flagg v. School Dist. 4 N. D. 45, 25 L.R.A. 363, 58 N. W. 499; National L. Ins. Co. v. Board of Education, 10 C. C. A. 637, 27 U. S. App. 244, 62 Fed. 778; National L. Ins. Co. v. Mead, 13 S. D. 37, 48 L.R.A. 785, 79 Am. St. Rep. 786, 82 N. W. 78; Board of Education v. McLean, 45 C. C. A. 658, 106 Fed. 817; Santa Cruz v. Waite, 39 C. C. A. 106, 98 Fed. 398; 20 Am. & Eng. Enc. Law, 1183, 1184; Goose River Bank v. Willow Lake School Twp. 1 N. D. 26, 26 Am. St. Rep. 605, 44 N. W. 1002; Swift v. Williamsburgh, 24 Barb. 427; Johnson v. Indianapolis, 16 Ind. 227.

Presumption cannot supply the requirement of a *record*. 22 Am. & Eng. Enc. Law, 1270; National L. Ins. Co. v. Mead, 13 S. D. 37, 48 L.R.A. 785, 79 Am. St. Rep. 786, 82 N. W. 78; St. Louis County v. Security Bank, 75 Minn. 174, 77 N. W. 815; Hennepin County v.

State Bank, 64 Minn. 180, 66 N. W. 143; *State v. United States Fidelity & G. Co.* 26 L.R.A.(N.S.) 865, and note.

There could be and was no ratification in this case. *State ex rel. Diebold Safe & Lock Co. v. Getchell*, 3 N. D. 243, 55 N. W. 585; *Fox v. Walley*, 13 N. D. 610, 102 N. W. 161; *Morris v. Ewing*, 8 N. D. 99, 76 N. W. 1047; *Capital Bank v. School Dist. 1* N. D. 479, 48 N. W. 363; *Gull River Lumber Co. v. School Dist. 1* N. D. 511, 48 N. W. 427; 25 Am. & Eng. Enc. Law, 50, 51, 60; 1 Am. & Eng. Enc. Law, 1183, 1184, 1199; *Goose River Bank v. Willow Lake School Twp. 1* N. D. 26, 26 Am. St. Rep. 605, 44 N. W. 1002; 31 Cyc. 1248, 1250, 1251, 1260-1262; 35 Cyc. 953, 962-964; 20 Am. & Eng. Enc. Law, 1180-1183, 1209, 1210; *Mechem, Agency*, 111, 112, 114, 115, 117, 121, 125, 136, 173, 378; 28 Cyc. 676-678; 30 Am. & Eng. Enc. Law, 96; 23 Am. & Eng. Enc. Law, 322, 370.

Albert E. Coger, for respondents.

It is clear that the members of the board, the attorney who drafted the resolution, and the treasurer, did not doubt that the board had full power to determine where the deposit of funds of the school district should be made. This resolution was delivered to the treasurer, and he was orally directed where to make deposits. A depository is a quasi public officer, and holds over. Laws of 1905, §§ 1472, 1488, ¶¶ 1, 17 of chap. 105; *Comp. Laws 1913*, § 1474; *Hall County v. Thomssen*, 63 Neb. 787, 89 N. W. 393; *Re State Treasurer's Settlement (Barley v. Meserne)* 51 Neb. 116, 36 L.R.A. 846, 70 N. W. 532.

The general rule is, in the absence of a contrary statute, that public officers hold over until their successors are elected and qualified. *St. Louis County v. Security Bank*, 75 Minn. 174, 77 N. W. 817; 23 Am. & Eng. Enc. Law, 412.

The rule that the treasurer is an insurer applies only in case that the officer is, by the law, made the depository. This is not the condition in this state. Laws 1905; *United States v. Prescott*, 3 How. 578, 11 L. ed. 734; *Bath v. McBride*, 163 App. Div. 714, 148 N. Y. Supp. 836; *United States v. Thomas*, 15 Wall. 337, 21 L. ed. 89; *State v. Houston*, 78 Ala. 576, 56 Am. Rep. 59; *York County v. Watson*, 15 S. C. 1, 40 Am. Rep. 675; *School Dist. v. Stoner*, 16 Montg. Co. L. Rep. 107; *Rose v. Hatch*, 5 Iowa, 149; *Cumberland County v. Pennell*, 69 Me. 357, 31 Am. Rep. 284; *Missoula County v. McCormick*, 4 Mont. 115,

5 Pac. 287; Albany County v. Dorr, 25 Wend. 440; Great Falls v. Hanks, 21 Mont. 83, 52 Pac. 785; State v. Gramm, 7 Wyo. 329, 40 L.R.A. 690, 52 Pac. 533; Healdsburg v. Mulligan, 113 Cal. 205, 33 L.R.A. 461, 45 Pac. 337; Wilson v. People, 19 Colo. 199, 22 L.R.A. 449, 41 Am. St. Rep. 243, 34 Pac. 944; Livingston v. Woods, 20 Mont. 91, 49 Pac. 437; State use of Overland County v. Copeland, 96 Tenn. 296, 31 L.R.A. 844, 54 Am. St. Rep. 840, 34 S. W. 427; Hobbs v. United States, 17 Ct. Cl. 189; Rowlett v. White, 18 Tex. Civ. App. 688, 46 S. W. 372; Roberts v. Laramie County, 8 Wyo. 177, 56 Pac. 915; Peck v. James, 3 Head, 75; Perley v. Muskegon County, 32 Mich. 132, 20 Am. Rep. 637.

The governing board here is the board of education. Its powers and duties are clearly defined by statute. Stephens v. Ludlow, 159 Ky. 729, 169 S. W. 473; Com. v. Godshaw, 92 Ky. 435, 17 S. W. 737.

To the board is committed the care, custody, and control of all property of the district. Comp. Laws 1913, § 1173; art. 7; Newburg v. Dickey, 164 App. Div. 791, 150 N. Y. Supp. 175; Carthage v. Frederick, 122 N. Y. 271, 10 L.R.A. 178, 19 Am. St. Rep. 490, 25 N. E. 480; Rochester v. Simpson, 134 N. Y. 417, 31 N. E. 871; Moore v. New York, 73 N. Y. 249, 29 Am. Rep. 134.

Not all of the provisions of article 7 of the act are mandatory. The board is vested with judicial discretion to select the depository. Henry County v. Salmon, 201 Mo. 136, 100 S. W. 20; Renville County v. Gray, 61 Minn. 242, 63 N. W. 635; Hennepin County v. State Bank, 64 Minn. 180, 66 N. W. 143; Emmons County v. First Nat. Bank, 9 N. D. 583, 84 N. W. 379; 23 Am. & Eng. Enc. Law, 458; Sutherland, Stat. Constr. 447, 448; State ex rel. Cothren v. Lean, 9 Wis. 279; Kipp v. Dawson, 31 Minn. 380, 17 N. W. 961, 18 N. W. 96; Johnson v. Day, 2 N. D. 295, 50 N. W. 701.

The neglect of the clerk to copy the resolution is not fatal to its validity. Troy v. Atchison & N. R. Co. 13 Kan. 70; Dill. Mun. Corp. 5th ed. §§ 538, 554, 557, 558; State, Staats, Prosecutor, v. Washington, 45 N. J. L. 323; Higgins v. Reed, 8 Iowa, 298, 74 Am. Dec. 305.

After the failure of the bank, one of the depositaries, the board made a proof of claim to the receiver. The board thereby ratified its deposit in such bank. National L. Ins. Co. v. Board of Education, 10

C. C. A. 637, 27 U. S. App. 244, 62 Fed. 778; *Bath v. McBride*, 163 App. Div. 714, 148 N. Y. Supp. 836; *Tillinghast v. Merrill*, 151 N. Y. 135, 34 L.R.A. 678, 56 Am. St. Rep. 612, 45 N. E. 375; *United States v. Thomas*, 15 Wall. 337, 21 L. ed. 89.

That an estoppel can arise against a municipality is well settled. *Abells v. Syracuse*, 7 App. Div. 501, 40 N. Y. Supp. 333; *Moore v. New York*, 73 N. Y. 248, 29 Am. Rep. 134; *North River Electric Light & P. Co. v. New York*, 48 App. Div. 24, 62 N. Y. Supp. 726.

Goss, J. This is an action at law to recover of the treasurer of the Rugby School District and sureties on his official bond, a balance of \$2,521 and interest, due the district from the defunct First National Bank of Rugby. That institution failed holding a deposit of school moneys of \$4,260 of a sinking fund with a deposit of some \$2,300 of other moneys of this district, but against which that bank held approximately \$3,000 of unpaid school warrants, which were offset against the deposit, leaving a balance of \$2,521 due over dividends credited. Defendant Nelson was treasurer from 1906 to 1910. Before his election the school board had designated the Merchants and First National Banks of Rugby as school depositaries. Defendant's predecessor had deposits in both of them when taken over by Nelson, who allowed deposits on account to remain as they were. The First National Bank had furnished the school board with a depositary bond in the sum of \$5,000, dated October 30, 1905, and which bond had been accepted by the board, and deposits made in said institution. The treasurer continued depositing in both depositaries throughout all times in question. During the last few months of 1908 the sinking fund was on order of the board deposited wholly with the First National. On June 12, 1908, Nelson received a letter bearing that date, addressed to him as school treasurer, and signed by the clerk of the district, and reading: "At an adjourned meeting of the Rugby School District No. 5 the following motion was made, seconded, and carried: 'It is moved that the school treasurer be directed to deposit all of the sinking fund now in his hands, less the amount required to pay interest on bonds July 1st, next, in the First National Bank of Rugby, North Dakota, on time deposit for six months.'" And the minutes of the meeting of said school board of said city, among other matters, contained the

portion above quoted. This resolution was not immediately complied with by the treasurer, but instead matters were permitted to remain as they were, except it appears that the treasurer afterward spoke to the members of the board and its clerk about exacting an additional bond from the First National Bank if the sinking fund was to be transferred to it, but the board informed him there was a bond on file, and did nothing toward requiring any additional bonds. Thus matters stood on September 30, 1908, when the members of the board collectively came to Nelson, and personally delivered him the following order that they told him they had that day passed as a board:

School Board in Special Session.

Moved by director Erickson, seconded by director Monson, that whereas there is a necessity of providing money for the payment of teachers' wages, and whereas the First National Bank has offered to pay the teachers' wages until funds are received, upon condition that the First National Bank be declared the depository of the school funds,

Now therefore it is hereby ordered that the treasurer of the Rugby School District from this date will deposit all the funds belonging to the Rugby School District Number 5 in the First National Bank.

(Signed) Ed. Erickson, President.

(Signed) P. A. Monson.

(Signed) Fred H. McBride.

This order was prepared at the usual meeting place of the board with a majority of the board present in session, and transcribed upon a typewriter by the person who had for some time acted as the board's clerk pro tem and stenographer, and was there signed by the first two members, the third signing at his place of business soon afterwards, and before it was delivered by the members of the board in person to the treasurer. But this order was not fully complied with, as the treasurer deposited with the First National Bank only the sinking fund and other funds subsequently coming into his hands, leaving with the Merchants Bank the other funds deposited there, but transferring the sinking fund from that bank to the First National. This resolution as a proceeding of the board was not spread upon its minutes at that

time. The First National Bank failed January 4, 1909, and immediately the deposits of school moneys in that bank were discussed by Nelson and the board, whereupon it was discovered that the board had not placed upon its minutes the order or proceedings had on September 30th, and a meeting of the board was held immediately, January 4, 1909, and the order spread upon the minutes, together with the following: "It was moved by P. Monson, which motion was duly seconded by F. H. McBride, that the above resolution be adopted and accepted and recorded in the minutes of this meeting. Meeting then adjourned." All this was done as of date of September 30th, that the minutes might accurately record the proceedings had on that date.

- The treasurer had acted with reference to the sinking fund under the letter and resolution of June, 1908, and had deposited said fund, amounting to approximately \$4,400, in the First National Bank, but not on time deposit as ordered. At a previous meeting of the school board under date of June 10, 1908, the record discloses the following to have occurred: "It was moved that the resolution declaring depositaries, which was passed on September 13, 1905, be rescinded, which motion was seconded and carried." But the treasurer denies all knowledge of this proceeding, and it appears that the only purpose of it was to enable the board to require the treasurer to deposit all of the school funds in the First National Bank, one of the two depositaries. This is shown by subsequent proceedings with reference to the sinking fund and the following resolution of the board immediately following the one in question: "It was moved that the treasurer be requested to furnish the board a statement of the amount that can be deposited on time, pursuant to chapter 103 of the School Laws of 1907, which motion was seconded and carried." Two days' adjournment was then had to June 12th, at which meeting the resolution was passed directing the deposit of all sinking funds with the First National. It is also plain that it was not the intent of the board by this so-called rescission to rescind the designation of the First National as a depositary, as that bank continued to be regarded by the board as its principal depositary and under the designation and bond of 1905, and which bond the board subsequently informed the treasurer was sufficient as a depositary bond to cover the sinking fund and deposits which he was directed to place in the First National.

Plaintiff contends that the school treasurer is the absolute insurer of the return to the district of all moneys reaching his hands, notwithstanding the law governing depositaries. Plaintiff further contends that, as no designation of depositaries was made by the board in 1907, there were no legal depositaries, and that the treasurer was charged with notice thereof and deposited funds in them, even at the order of the board, at his own risk, which position assumes that he was bound to know that there was no valid designation of depositaries, and no sufficient or valid bonds to cover the deposit made.

By chap. 105 of the Session Laws of 1905 a complete and comprehensive depositary plan was enacted. Whether prior to that date the liability of city and school district treasurers was absolute as insurers of moneys received or less limited under the several rules prevailing in the absence of depositary statutes is foreign to this inquiry. It is certain that under this enactment the officer is no longer an insurer against loss where he has complied with the statute requiring the deposit of public funds in the depositary bank. Comp. Laws 1913, § 1486. Instead of the old relationship of liability of the official to the municipality, the legislature has seen fit to declare it to be the better policy to substitute a relation of debtor and creditor as between the bank and the municipality. By § 1481, Comp. Laws 1913, "all funds of the city or school district shall be deposited in the name of the city or school district, by the city treasurer or treasurer of the school district, as soon as received by him, in such bank or banks as shall have been designated as city or school district depositaries." Such deposit must be made in the name of the school district, and in harmony therewith § 1484 provides that "all checks drawn upon the city or school district depositaries shall be signed by the city or school district treasurer in the name of the city or school district, by himself as treasurer." And a penalty for violation of these statutes shall be imposed under § 1482 if he "shall deposit any of the funds of his city or school district, or loan the same in any manner except according to the provisions of this article." And § 1488 makes a violation "of the provisions of this article" also a misdemeanor. If this money has been deposited in a depositary, the school district has, in the language of the opinion in 51 Neb. 116, in legal effect, made "a loan of such moneys to the bank; and the relation of debtor and creditor is thereby created, not between

the bank and the treasurer, but between the former and the state (school district), since the money thus deposited belonged to the state (school district), and not to the treasurer, its agent and representative. A depositary bank being the state's (district's) debtor for all funds deposited therein in compliance with law, all sums so remaining on deposit at the close of . . . (the treasurer's term) were not moneys in his hands in such a sense as he was bound at his peril to produce them in making settlement with his successor." The words in parenthesis are ours to better apply the language of the holding of *Re State Treasurer's Settlement* (Bartley v. Meserve) 51 Neb. 116, 36 L.R.A. 746, 70 N. W. 532, quoted in *Hall County v. Thomssen*, 63 Neb. 787, 89 N. W. 393. And prior to the passage of a depositary statute in Nebraska, that state held the official to be the insurer of public moneys received by him. *Bush v. Johnson County*, 48 Neb. 1, 32 L.R.A. 223, 58 Am. St. Rep. 673, 66 N. W. 1023, on a treasurer's bond for the period from 1889-1891. But as the foregoing illustrates, such liability was entirely changed by the enactment in 1891 of a statute similar to this. And of course the legislature has plenary power to prescribe the liability of its officials for the funds of it or its municipalities. The state could not elect to loan its money or that of its municipality to a bank, as here done, under the depositary law, and compel the treasurer as its representative under criminal penalties to create such relationship, he having no voice in the selection of the depositary, and at the same time hold him as an insurer of the state's debtor, the bank. Such would constitute confiscation of the private property of the individual who happened to be a public officer charged to receive public moneys. The state has therefore chosen to depart from any absolute or limited theory of the officer as insurer, and has substituted therefor the liability of its depositary, assuming rather to take the risk of the latter than of the official as to ability to respond for public funds. This disposes of many of the cases cited upon the official's common-law liability for loss of public funds. There are at least four different and distinct basic theories for such liability in the absence of a depositary statute. *Mechem*, Pub. Off. §§ 297-303. For conflict in the various jurisdictions on such questions, see 22 L.R.A. 449; 31 L.R.A. 844; 32 L.R.A. 223; and 33 L.R.A. 461, and cases so annotated.

Hence, the necessity of settling the law by statute as has been done by the act cited. If this bank was a depositary, this official is exonerated from liability in the absence of some cause shown to the contrary.

That this bank had been regularly designated as depositary in 1905 conclusively appears. It is admitted that in 1907 no new designation of depositaries was made. No steps were taken to that end by the board or its clerk. It was the duty of the clerk to advertise for bids for designation as depositary for at least two weeks prior to the first regular meeting of the board in July of each odd-numbered year, *i. e.*, in 1907; and it was the duty of the board at said meeting to designate the depositaries for the two years from July, 1907, to July, 1909, and during which period this bank failed; but the same was not done. This was its duty, however, only as to depositaries in which current or ordinary deposits are required to be made. It does not apply to time deposits under the express provisions of §§ 1478, 1479, because depositaries for time deposits can be designated after advertisement at any time, and need not be the depositary in which money on call is deposited. It is unnecessary to determine whether the statute, § 1479, is permissive only or mandatory as to advertising for time depositaries. It is sufficient that the school board did, by its resolution of June 12th, direct the treasurer "to deposit all of the sinking fund now in his hands, less the amount required to pay interest on bonds July 1st, next, in the First National Bank of Rugby, North Dakota, on time deposit for six months." So far as time deposits are concerned, the order of date September 30, 1908, "that the treasurer of the Rugby School District from this date will deposit all the funds belonging to the Rugby School District No. 5 in the First National Bank," may be disregarded and assumed to be irregular. The treasurer had the right to assume that it was a step toward enforcement of compliance with the resolution of June 12th, directing the deposit of the sinking fund in the First National Bank, as it was in fact. This resolution is a sufficient designation of that bank to answer the requirements of the statute. It is no objection thereto that no advertisement for bids had been had, as the treasurer had the right to assume, certainly in the absence of knowledge to the contrary, the regularity of the designation. The board, and not the treasurer, had the disposition of the school funds. It was the latter's duty to comply with the directions

of the board under pain of statutory penalties of imprisonment or forfeiture, or both. The responsibility rested not with the treasurer, but with the board, when the former followed the written orders of the latter. The official certainly cannot be under criminal liability for his refusal or neglect to comply with the requirements of the board, and at the same time be liable for loss of funds where he has complied with its unequivocal order to deposit. He must deposit the school funds "as soon as received by him, in such bank or banks as shall have been designated . . . as school district depositories." It is not the treasurer's duty to select depositories, but instead to comply with the orders of the board to deposit where that body having the power to designate depositories has directed the deposit to be made. Comp. Laws 1913, § 1481. Neither the power nor the resulting responsibility to designate can be divided between the treasurer and the board, and it is not so divided by statute.

But it appears that the treasurer, though not bound to do so under circumstances disclosed in the evidence, did nevertheless attempt to insist upon an additional bond being given by said bank before or after the sinking fund was deposited and with reference thereto.

He testifies:

Some time in the latter part of June I think I spoke in regard to the additional bond for the sinking fund.

The clerk said: "They had a bond up, the First National Bank. . . . I just spoke to them different times in regard to the bond. . . . (The board) said they had a bond up from the First National as a depository.

Q. You went to Lander, the clerk, and suggested the propriety of an additional bond in June, 1908?

A. I did.

Q. And that was in the event that the deposit should exceed the amount of the depository bond?

A. Yes, sir.

The duty to require additional bonds was upon the board. Section 1475, Comp. Laws 1913, in part reads: "If at any time the amount of funds on deposit in any of such depositories shall exceed one half of

the amount named in such bond it shall be the duty of the . . . school board at its next regular meeting thereafter to require from such depository an additional bond in a sum not less than twice the amount of such excess. Such bond shall be approved by the . . . school board and the approval thereof indorsed thereon by the . . . president of the school board and by him deposited with the . . . school district clerk." Therefore in making inquiry the treasurer went to the proper source for knowledge, the custodian of such bonds. Besides this he consulted the board. He did all that he was required to do before compliance with the orders of the board respecting deposits. The responsibility for the loss is not with the defendant treasurer, as he had no option in the matter but to comply with the orders of the board. That the proceedings of that body were irregular because no advertisement for bids for deposits or because additional bonds have not been required is immaterial. The defendant had the right to presume that the school board had performed its duties.

That the relation of debtor and creditor arose from the deposit with the bank, no matter how irregular the designation or without a designation, so long as the deposit was made upon the order of the board, there can be no doubt. The bank by accepting the money would be estopped to deny its liability to return it to the district in any event, and there can exist no valid ground upon which to charge the treasurer with any responsibility for this loss. Recent cases under depository statutes are elucidating on this subject. *Stephens v. Ludlow*, 159 Ky. 729, 169 S. W. 473; *Bath v. McBride*, 163 App. Div. 714, 148 N. Y. Supp. 836.

But the treasurer is exonerated from liability upon another ground sufficient in itself. The designation in 1905 of depositories, one of which was this bank, continued under the terms of § 1475, Comp. Laws 1913, without a new designation in 1907, so long as the board and the bank continued such relationship. It was at least a *de facto* depository, and as such so far as all persons interested in this suit are concerned, at all times a legal depository of the public funds of said school district, and as such it was the duty of the treasurer to deposit said funds therein at the order of the board. Such is the intent of the statute, § 1475 providing that such relationship "shall continue as such until such time as the . . . school board shall advertise for

bids as aforesaid," *i. e.*, shall designate another depositary after advertisement therefor. Appellant contends that this provision is limited to those depositaries first designated without advertisement and prior to July, 1905; but inasmuch as there was no more reason for the continuation of such temporary depositaries than there is for those designated after advertisement, and the statute is ambiguous, public policy alone requires that the statute be interpreted to cover both classes of depositaries, temporary and for a term. A vacancy between the terms of permanent depositaries is equally as obnoxious and dangerous to public funds as between the first temporary and the first permanent ones. But this bank holds under the first or temporary designation evidently, or else the statute must be construed as directory as to dates. Chap. 105, Laws of 1905, has no emergency clause, and went into effect July 1, 1905. By the time the statute became such, the time for advertisement for "at least two weeks immediately prior to such meeting," *i. e.*, the "first regular meeting in July," had passed, and it was an impossibility to comply with the statute as to designation upon advertisement in July, 1905. Hence the designation without advertisement authorized in 1905 carried over until 1907 under the terms of § 1473. That being so, § 1475 must apply and continue such depositary "until such time as the school board shall advertise for bids as aforesaid." The statute is open to no other construction under appellant's own contentions that it be taken as mandatory, which contention it is unnecessary to pass upon. The right of this bank to act as depositary of the funds of this district did not cease or lapse at the expiration of the first regular meeting in July, 1907, of the school board on its failure to redesignate upon advertisement therefor said bank as such depositary. All that portion of appellant's brief based upon such assumption is an argument upon a false premise. This likewise disposes of all objections interposed and assignments thereon of error to the admission of the testimony of the 1905 designation, including the bond at that time executed and delivered by this depositary to the district.

General depositary provisions are also found in § 168 of chapter 263 of the Session Laws of 1911, or subdivision 2 of § 1297 of the Compiled Laws of 1913, having been carried forward from § 983 of the Code of 1905, in turn a codification of chapter 190, Session Laws 1901, greatly amending and enlarging § 820, Revised Codes 1899, orig-

inally enacted as § 204, Session Laws 1890. In reading these statutes it is noticeable that the first idea of departure from common-law liability of the treasurer for loss of funds arose from necessity of permitting the investment of sinking funds. In 1901 these statutes were further amplified. To this there was attached the original enactment concerning depositaries of sinking funds, coupled with which was the first exoneration of liability of the treasurer when such a deposit was complied with. This has been carried forward as the present § 1297, Comp. Laws 1913. From this source evidently arose the general depositary statutes found in §§ 1472-1488, inclusive, Comp. Laws 1913. But these must be read in the light of the general powers conferred by §§ 1173 and 1213, Comp. Laws 1913, but which are early enactments, which consequently must give way where necessary as modified by the specific statutes under investigation concerning depositaries and exoneration of liability. All are harmonious, however, when §§ 1173 and 1213 are thus read and taken as conferring but general authority. Appellant has emphasized § 1213, and contends that thereunder the defendant treasurer has the control as against the district school board of the district's funds. It is unnecessary to determine the extent to which the treasurer has exclusive control, further than already stated. It must be remembered in construing these statutes that § 1213 has been the law of this state almost since statehood, it being found as § 93 of the Session Laws of 1890, at which time there did not exist these statutes under investigation. It may be conceded that prior to such depositary statutes the treasurer was the insurer of the district funds, yet under the explicit terms of the statute as well as under the reason for its enactment, an entirely different theory and basis of official liability is now the law. Under § 1213 the treasurer has the control of the funds for the purposes of deposit and until deposited, and even thereafter to the limited extent of checking them out in the name of the district by himself as treasurer upon warrant of the school board as his authority to disburse. The custody of funds granted the treasurer by § 1213 is limited and subject to the other provisions involved, instead of it limiting the later enacted statutes, as appellant would construe it to operate.

The complaint being for recovery of a balance of funds of the district coming into the hands of its treasurer, he and his bondsmen have

established a prima facie defense when it was shown that the shortage exists because of the failure of the depositary wherein the school funds had been placed by the treasurer under order of the board. The burden of procedure then shifted to plaintiff and appellant to avoid the effect of such defense by proof that there was no depositary or that such a deposit was not made, or otherwise destroy such prima facie defense. In this the plaintiff board has wholly failed, but instead has established that the loss was through the fault of the depositary designated by the board, in which, under its order, the money was deposited and in obedience of law, a complete exoneration of the defendant. There is no question of negligence involved, nor could there be under the pleadings. The suit is not one for loss arising from a negligent deposit, if such a claim could be valid against a treasurer. Besides the facts exonerate him from negligence. Any fault on that score is elsewhere. The judgment of the District Court is affirmed, with costs.

NORTHWESTERN TRUST COMPANY, a Corporation, v. F. T. FOX.

(157 N. W. 472.)

Corporate stock — note given for — suit on note — consideration — failure — evidence — verdict — not supported — new trial — motion for — denied — error.

Suit upon a note given in part payment of corporate stock. Defense was failure of consideration. Evidence examined, and *held* not to support the verdict rendered by the jury in favor of the defendant. For this reason the trial court should have allowed plaintiff's motion for a new trial.

Opinion filed March 25, 1916.

Appeal from the District Court of Ramsey County, *Buttz, J.*
Reversed.

Bangs, Netcher, & Hamilton, and *Cuthbert & Smythe*, for appellant.

Where a note is assigned and later on the assignee and holder obtains from the maker a new note for the amount of the old or assigned note, in lieu thereof, and made payable to himself, it is founded upon a

valuable consideration, and independent of that on which the original note was founded; a failure of consideration of the original note is no defense in an action on the latter. 8 Cyc. 36; Williams v. Rank, 1 Ind. 230.

While fraud or artifice exists in the taking of a note, causing a failure of consideration, this may be shown in a suit on the note, between the original parties; but such defense is not, as a rule, allowed in a suit by a bona fide holder for value. 8 Cyc. 38.

Negligence on the part of the maker defeats any immunity under this rule, even though fraud is shown between the original parties. 8 Cyc. 41.

The fraud necessary to defeat a recovery by a bona fide holder, assignee, of a promissory note before maturity, must relate to the execution, and not to the consideration, of the note. Gray v. Goode, 72 Ill. App. 504; Plumb v. Niles, 34 Vt. 231.

A debtor, by his conduct in inducing the assignee to believe that the obligation will be met and that there is no defense thereto, may be held to have waived the right to avail himself of a set-off against the assignor in an action by the assignee. Vallancey v. Hunt, 20 N. D. 589, 34 L.R.A.(N.S.) 473, 129 N. W. 455; Musselman v. McElhenny, 23 Ind. 4, 85 Am. Dec. 445; Forbes v. Espy, 21 Ohio St. 483; 8 Cyc. 64, Estoppel.

The equity doctrine of estoppel *in pais* applies in this case. After the conduct of defendant in holding out to plaintiff the fact that the obligation was good, and plaintiff has changed his position to his detriment, in reliance upon the representations of defendant, estoppel arises, and defendant will not be allowed to interpose any defense. Haugen v. Skjervheim, 13 N. D. 616, 102 N. W. 311; Parlman v. Young, 2 Dak. 175, 4 N. W. 139, 711; Eickelberg v. Soper, 1 S. D. 563, 47 N. W. 953; Sutton v. Consolidated Apex Min. Co. 15 S. D. 410, 89 N. W. 1020; Dezell v. Odell, 38 Am. Dec. 631, note.

R. Goer and Miller, Zuger, & Tillotson, for respondent.

Where a necessary witness has not been subpoenaed, and no such effort made to secure his presence upon the trial, the party has been negligent and lax in his own interests.

The answer here discloses the name of the witness or person with whom defendant had his dealings, and this surely was sufficient to

enable plaintiff to know that such person was a material witness for their side of the case. Under these circumstances, the absence of such witness affords no ground for a new trial.

Further, the affidavit of this witness himself shows that he was informed long before the trial by the plaintiff's attorneys, that he would be needed as a witness on the trial. *Josephson v. Sigfusson*, 13 N. D. 312, 100 N. W. 703; *Gaines v. White*, 1 S. D. 434, 47 N. W. 524; *Weiss v. Evans*, 13 S. D. 185, 82 N. W. 388.

Defendant asked no continuance to secure witnesses, nor did they make any effort to that end. *Smith v. Shook*, 30 Mont. 30, 75 Pac. 513.

"While fraud is never presumed and must be proved, it is not necessary that it be proved by direct evidence; it may be shown by facts and circumstances connected with the transaction. *Klauber v. Schloss*, 198 Mo. 502, 115 Am. St. Rep. 486, 95 S. W. 930.

The existence of a contemporaneous parol agreement between the parties under the influence of which a note or contract is made and delivered, and which is violated at once after obtaining the note, may always be shown when enforcement of note is attempted. *Clinch Valley Coal & I. Co. v. Willing*, 180 Pa. 165, 57 Am. St. Rep. 626, 36 Atl. 737.

A promise made with the intention not to perform it constitutes fraud for which a contract may be avoided or rescinded. *Russ Lumber & Mill Co. v. Muscupiabe Land & Water Co.* 120 Cal. 521, 65 Am. St. Rep. 186, 52 Pac. 995.

And this is so with each successive renewal. *Turtle v. Sargent*, 63 Minn. 211, 56 Am. St. Rep. 475, 65 N. W. 349; *Clare County Sav. Bank v. Featherly*, 173 Mich. 292, 139 N. W. 61; 17 Cyc. 713 et seq; *American Bldg. & L. Asso. v. Dahl*, 54 Minn. 355, 56 N. W. 47.

BURKE, J. Appeal from an order denying plaintiff a new trial. Said motion was based upon many grounds, among them insufficiency of the evidence to support the verdict, estoppel of defendant to maintain his defense, errors in admitting and excluding proof, and newly discovered evidence. It will not be necessary for us to discuss all of those. The facts leading up to the motion for a new trial are in part as follows: In March, 1912, one C. A. Hale solicited the defendant to

buy stock in the Great Northern Life Insurance Company and possibly in the Great Northern Underwriter's Company, there being a sharp dispute as to the underwriting stock. After some negotiations, Mr. Fox agreed to purchase ten shares of stock (of some kind) of the par value of \$100 each, and executed his promissory note for \$1,000 running to the Great Northern Underwriter's Company. The note was sold to this plaintiff. Shares of stock were issued, five in the life insurance company and five in the underwriter's company, and held as collateral to the notes. The note was not paid at maturity, and, in response to a demand for payment, defendant wrote the following letter:

In reply to yours of the 26th will say I will rustle the interest on the note shortly after the first of the year, say January 10th, but it will be impossible for me to take up the note, at least until next fall. With all the big crop—fully 50 per cent of the farmer trade asked to be carried over and in fact demanded it. Hoping this will meet with your approval.

(Signed) F. T. Fox.

Plaintiff waited until after January 10th, but did not receive the interest, and on May 14, 1913, suit was begun upon the note. June 4, 1913, an answer was interposed, and on August 13, 1913, an amended answer. The case was set for trial January 27, 1914, and on the day of the trial negotiations for settlement were had whereby the defendant gave two notes of \$500 each and three notes for the interest amounting to \$179.66, all running to the Northwestern Trust Company. At this time the original \$1,000 note was canceled and delivered to defendant and the suit dismissed. When the first of the interest notes, being one for \$79.66, became due and remained unpaid, a suit was begun thereon in justice court. Judgment was entered in favor of plaintiff and appeal taken to the district court. It was upon this trial that the errors alleged occurred that formed part of the basis for the motion for a new trial. Judgment was rendered in favor of the defendant and this appeal follows. The answer in this case alleged that at the time the original \$1,000 note was given, Mr. Hale had agreed with him to deliver to him immediately the ten shares of the Great Northern Life Insurance stock, and had agreed that the note itself should not be trans-

ferred. He claims that both of those promises were broken. Among the errors alleged to have occurred at the trial was the refusal of the trial court to allow the original answer and amended answer, interposed by defendant, upon the \$1,000 note, to be received in evidence as an admission that at that time defendant knew that the notes were payable to the underwriter's company. Error was also predicated upon the refusal of the trial court to allow plaintiff to show that the original \$1,000 note was payable to the Great Northern Underwriter's Company, as an impeachment of the testimony of the defendant that said note was in favor of the life insurance company. Error was also predicated upon the admission in evidence of two letters from the Great Northern Life Insurance Company written to the defendant, one of the letters being written long before the \$1,000 note was signed, the other being merely a formal notice of a meeting of stockholders. As defendant concedes he was to have at least five shares of this stock, the fact that he received a notice of a stockholders' meeting would not have the slightest tendency to show that the company recognized him as owner of ten shares. As a matter of fact, the trial court struck out both of those letters, but without any caution to the jury to disregard the same. These and other serious errors were argued, together with the main contention, to wit, that the defendant wholly failed by his evidence to substantiate his claim that the stock was to be entirely that of the life insurance company, and that defendant is now estopped to make such defense in view of his previous conduct in signing the original note, in signing the renewal notes, in writing the letter promising to pay the original note, and serving two answers showing other defenses. We believe appellant is correct in this contention, but prefer to put our holding upon this proposition, to wit, that plaintiff's evidence does not establish his defense of failure of consideration. Upon the actual trial the witness Hale was not present, but defendant testifies regarding the conversation with him. Although cross-examined by his own attorney, he failed—as we believe—to testify to the defense outlined in his answer.

Finally, the court examined him and said:

Q. You have got to give this conversation as near as you can remember the talk back and forth.

A. I don't know that I can repeat it just as it happened.

Q. Well, do the best you can at it.

A. As near as I can remember they came in and wanted to settle with new notes—two—for that stock—I think that was the talk.

Q. And what did you say to them when they wanted new notes?

A. Well, I hesitated for a while and they persuaded me.

Q. Now, what did you say to them—or did you say anything to them?

A. Yes, I did.

Q. All right, what did you say?

A. I asked them if the stock was worthy of the price and how soon I was to get it. . . .

Q. What did they say?

A. They agreed to deliver it.

Q. No—*what did they say?*

A. I don't remember what he did say.

At this point his attorney attempted to lead him into a positive statement, but he was stopped by the court, and when the proper question was asked he answered:

A. Well, now, I could not quite—I don't quite remember what our conversation was. . . .

By the Court: What did they say to that?

A. They finally told me—I think that it was—that it had been issued—that something was wrong. I don't know what it was, now. I don't remember exactly. And he claimed at that time he had that stock with him. He did not give it to me nor show it to me. I did not look at it; and he finally—I signed these new notes with the expectation of getting this stock at that time, which they refused to deliver. . . . They claimed they were going to hold that stock after it was issued for security.

Q. To the notes?

A. To the notes. But it has never been delivered, nor did I ever see it.

Again defendant's counsel attempts to lead him into a positive state-

ment, but was again stopped by the court upon objection of plaintiff. Later in his testimony the following occurred:

A. I asked him why I was not receiving the stock, and he said that they held it and they were holding it for security—and that was after I settled with him the last time.

Q. Was that after you settled with him?

A. Yes, and that they would hold it for security.

There is much more of this kind of testimony, but we have no hesitation in saying upon the whole record, which we have carefully examined, there is a total failure of proof of the only defense interposed. Taken in connection with the serious question of defendant's estoppel; the errors in the reception and rejection of testimony; the fact that defendant admits he was allowed one half of the stock he ordered; to say nothing of the new evidence offered,—it was clearly an abuse of discretion in the trial court to refuse a new trial to plaintiff. For this reason the order of the trial court is reversed.

PAUL PAULSON v. L. B. SORENSON and Halvor Halvorson.

(157 N. W. 473.)

Plaintiff was the owner of some flax; defendant owned a threshing machine. There was a contract between the parties the terms of which are in dispute. Plaintiff claims that the threshing was to be done at a certain time, and defendant claims at another time. When defendant refused to thresh at the time contended for by plaintiff, the latter stacked the grain. This suit claims damages upon two items: First, \$125,—the expense of stacking; and, second, a drop of 30 cents in the market price of the flax. The case was tried to a jury, who found for the plaintiff in the sum of \$25. The trial court taxed costs in favor of the defendant. Plaintiff appeals, demanding a new trial upon the grounds that the evidence is insufficient to support his verdict, and also assigns error upon the taxation of costs against him.

Threshing of grain—contract—price of threshing—time for performance—damages for failure—evidence—defendant—appeal by—failure to—appeal must stand—new trial.

1. Upon an examination of the evidence it is held that plaintiff is not

entitled to more than the \$25 judgment. In the absence of appeal by the defendant, the verdict will stand.

District court — costs in — plaintiff entitled to.

2. Under § 7794, Comp. Laws 1913, the plaintiff was entitled to costs in district court.

Opinion filed March 25, 1916.

Appeal from the District Court of Divide County, *Leighton, J.*
Affirmed.

C. E. Brace and *E. R. Sinkler*, for appellant.

By reason of defendants' failure to perform their contract and do the plaintiff's threshing in proper time, plaintiff was compelled to and did pay out for stacking the grain a large sum, and that by such failure of defendants he lost a large amount on the market price of said grain. Such damages are not too remote, but are properly recoverable in this action. Such damages were in contemplation of the parties when they made their contract, and at the time of its breach. *Hayes v. Cooley*, 13 N. D. 204, 100 N. W. 250.

The jury had no authority under the evidence to find a verdict for plaintiff in the sum of \$25 only. There is no evidence to support any such verdict, or the evidence did not warrant the jury in so finding, and the verdict is contrary to the evidence under which it is wholly inadequate. *Benton v. Collins*, 125 N. C. 83, 47 L.R.A. 33, 34 S. E. 242.

A verdict for a sum clearly inadequate under the evidence stands upon no better or higher ground than a verdict for an excessive amount and may likewise be set aside. *McDonald v. Walter*, 40 N. Y. 551; *Richards v. Sandford*, 2 E. D. Smith, 349; *Paul v. Leyenberger*, 17 Ill. App. 167; *Hackett v. Pratt*, 52 Ill. App. 346.

Where the amount to which a party is entitled is susceptible of adjustment and ascertainment by easy computation, and a verdict is rendered lower than the lowest estimate, it should be set aside as contrary to the evidence. *Fawcett v. Woods*, 5 Iowa, 400; *Duff v. Hutson*, 2 Bail. L. 215; *State ex rel. Scott County v. Wilson*, 90 Ind. 114.

Such relief is clearly within the power of the court. *Taunton Mfg. Co. v. Smith*, 9 Pick. 11; *Watson v. Harmon*, 85 Mo. 443; *Powers v. Gouraud*, 19 Misc. 268, 44 N. Y. Supp. 249.

And such action is not an abuse of discretion where the finding in favor of the plaintiff entitled him to substantial damages, but only nominal damages are awarded. *Conrad v. Dobmeier*, 57 Minn. 147, 58 N. W. 870; *Hood v. Ware*, 34 Ga. 328; *Shropshire v. Doxey*, 25 Tex. 127; *Howe v. Lincoln*, 23 Kan. 468.

Plaintiff was entitled to costs even on the verdict as rendered. *Comp. Laws 1913*, § 7794; *Laney v. Ingalls*, 5 S. D. 183, 58 N. W. 572; *De Smet Twp. v. Dow*, 4 S. D. 163, 56 N. W. 84.

Geo. P. Homnes, for respondents.

Where one's failure to perform his contract merely exposes property to destruction by causes for which he is not responsible, the supervening cause, and not his failure to perform, is the proximate cause of loss. *Hayes v. Cooley*, 13 N. D. 204, 100 N. W. 250; 1 *Sedgw. Damages*, § 152; *Daniels v. Ballantine*, 23 Ohio St. 532, 13 Am. Rep. 264; *Jones v. Gilmore*, 91 Pa. 310, 1 Am. Neg. Cas. 929; *Dubuque Wood & Coal Asso. v. Dubuque*, 30 Iowa, 176; *Morrison v. Davis*, 20 Pa. 171, 57 Am. Dec. 695; *Denny v. New York C. R. Co.* 13 Gray, 481, 74 Am. Dec. 645; *Memphis & C. R. Co. v. Reeves*, 10 Wall. 176, 19 L. ed. 909; *Comp. Laws 1913*, § 7146; *Prosser v. Jones*, 41 Iowa, 674; *Fuller v. Curtis*, 100 Ind. 237, 50 Am. Rep. 786; *Peters v. Whitney*, 23 Barb. 24; *Riech v. Bolch*, 68 Iowa, 526, 27 N. W. 507.

The gain which plaintiff might have made on the market price of the grain had the threshing been done is a matter wholly speculative and remote. *Coweta Falls Mfg. Co. v. Rogers*, 19 Ga. 416, 65 Am. Dec. 602; *Bosqui v. Sutro R. Co.* 131 Cal. 390, 63 Pac. 682, 9 Am. Neg. Rep. 233; *Liming v. Illinois C. R. Co.* 81 Iowa, 246, 47 N. W. 66.

Compensation for actual, tangible, and provable loss only may be given. *Smeed v. Foord*, 1 El. & El. 602, 28 L. J. Q. B. N. S. 178, 5 Jur. N. S. 291, 7 Week. Rep. 266; *Houser v. Pearce*, 13 Kan. 104.

After a breach of contract by one party, it is the duty of the other contracting party to do all in his power to prevent or reduce the damages that may result. *Wells v. National Life Asso.* 53 L.R.A. 108, note; *Davis v. Fish*, 1 G. Greene, 406, 48 Am. Dec. 387; *Gniadck v. Northwestern Improv. & Broom Co.* 73 Minn. 87, 75 N. W. 894; 1 *Sedgw. Damages*, 201, 202.

A specification of insufficiency of the evidence to sustain the verdict

or decision shall point out wherein the evidence is insufficient. *Comp. Laws 1913, § 7656; 29 Cyc. 944.*

A party cannot appeal from a part of a judgment. *Prescott v. Brooks, 11 N. D. 93, 90 N. W. 129; Crane v. Odegard, 11 N. D. 342, 91 N. W. 962.*

In an action for the recovery of money, where plaintiff's recovery is less than \$50, he is not entitled to costs. It is the amount recovered, and not the amount for which suit is brought, that determines the right to costs. *Comp. Laws 1913, § 7794; Pyle v. Hand County, 1 S. D. 385, 47 N. W. 401; Goldberg v. Kidd, 5 S. D. 169, 58 N. W. 574; De Smet Twp. v. Dow, 4 S. D. 163, 56 N. W. 84; Alexander v. Hard, 42 How. Pr. 131; Landsberger v. Magnetic Teleg. Co. 8 Abb. Pr. 35; Kreuger v. Zirbel, 2 Wis. 233; Peet v. Warth, 1 Bosw. 653; Mechl v. Schwieckart, 67 Barb. 599.*

Where the amount recovered shows that the cause was within the jurisdiction of an inferior court, the defendant is entitled to costs. *Goldberg v. Kidd, 5 S. D. 169, 58 N. W. 574; 5 Standard Proc. p. 879; Laney v. Ingalls, 5 S. D. 183, 58 N. W. 572.*

BURKE, J. Plaintiff was the owner of some flax, defendant owned a threshing machine. Defendant agreed to thresh for plaintiff, but there is a dispute as to the terms of the contract. Plaintiff claims defendant was to thresh his flax immediately after a specified neighbor; defendant says he was to thresh for plaintiff at a later time. When the time to thresh, under plaintiff's version, had arrived, defendant refused to come, whereupon plaintiff stacked his flax at an expense of \$125. When defendant thought the proper time had arrived, plaintiff would not let him do the job. Some other thresher did the work later in the fall, and in the meantime the price of flax had dropped 30 cents a bushel. Plaintiff brings this action in district court, asking for two items of damage,—first, for the \$125 which he had paid for stacking his flax; and, second, for the 30 cents a bushel drop in the market price of 700 bushels of flax. The case was tried to a jury, who found in favor of the plaintiff and assessed his damages at \$25, instead of the \$335 demanded. The trial court taxed costs in favor of the defendant upon the theory that the action should have been brought in the justice

court. As the taxable costs exceeded the amount of the verdict, defendant was really a little to the good and did not bother to appeal. Plaintiff, however, appeals from the order denying him a new trial.

(1) Appellant says in his brief: "If the plaintiff was entitled to recover anything, he was entitled to recover \$335, being the loss he actually sustained. There is no evidence in the record warranting the jury in finding for the plaintiff for only \$25." It is evidently his desire to get a new trial in order that he may recover a larger verdict next time. He is attacking the validity of his own verdict, because—as he says—there is no evidence to sustain it. On the other hand he does not claim that the evidence is such that he was entitled to a directed verdict for any amount. We do not agree with his logic. The court had, no doubt, the right to set aside the verdict if unsupported by evidence. It also had the right to set it aside if it was palpably inadequate, but the facts do not call for any such relief. It is almost too clear for argument that the depreciation in the price of flax was not chargeable to the defendant. *Hayes v. Cooley*, 13 N. D. 204, 100 N. W. 250; *Lynn v. Seby*, 29 N. D. 420, L.R.A.1916E, 788, 151 N. W. 31. It was apparent to the jury that the cost of stacking the flax was not chargeable to the defendant without proper deductions for the lessened expense of threshing the same. Gathering the grain together in one place must be done in shock threshing as well as in stack threshing, and it is only the ultimate difference in cost which should be allowed as damages. The jury, no doubt, took into consideration all of those facts. As the defendant has not complained of the verdict it will stand.

(2) The taxation of costs in favor of the defendant provokes the second assignment of error. Section 7794, Comp. Laws 1913, reads as follows: "Costs shall be allowed of course to the plaintiff upon a recovery in the following cases: 1. . . . 2. . . . 3. In the actions of which a justice's court has no jurisdiction. 4. In an action for the recovery of money when the plaintiff shall recover fifty dollars. . . . Costs shall be allowed of course to the defendant in the actions mentioned in this section unless the plaintiff is entitled to costs therein." Appellant submits no cases in point, and the only cases upon this subject coming to our attention (those from South Dakota and the ones therein cited) appear to be against his contention. The South Dakota

decisions upon the identical statute start with *Pyle v. Hand County*, 1 S. D. 385, 47 N. W. 401, where the plaintiff brought suit in the circuit (corresponding to our district) court, for \$271.95, and the jury gave him a verdict for \$1. The court says: "Should plaintiffs, however, bring their actions in the higher courts, when the subject-matter was within the jurisdiction of justice of peace courts, a penalty was fixed against them, by requiring them to pay the costs of the action, unless the recovery was for \$50 or more. The test is, Had the court of justice of the peace jurisdiction of the subject-matter at the time of the institution of the suit? If it had, a recovery for less than \$50 by the plaintiff subjects him to the penalty of paying the costs."

In *De Smet Twp. v. Dow*, 4 S. D. 163, 56 N. W. 84, suit was brought in the circuit (district) court for an amount in excess of the jurisdiction of the justice of the peace, but the recovery was for \$40.71. The court says: "We are of the opinion that the true construction of that provision, taken in connection with § 6042, conferring jurisdiction on justices' courts, is that the defendant is entitled to costs in an action for the recovery of money, when the plaintiff recovers less than \$50, where the justice would have had jurisdiction of the subject-matter in case the claim stated in the summons or complaint had been made for a sum within the jurisdiction of the justice. In other words, in determining the question as to the party entitled to costs, the amount claimed in the summons or complaint in the circuit court is not material if the amount recovered is less than \$50, and the justice's court would have had jurisdiction of the action if the amount recovered had been claimed in an action in a justice's court. If the amount claimed in the action in the circuit court could be considered in determining the question of costs, it would be in the power of any plaintiff to bring his action, whatever his claim might be, in the circuit court, and recover costs by claiming an amount in his complaint in excess of the jurisdiction of a justice, though he might recover less than \$50. Such a construction of the statute is entirely inadmissible. The evident intention of the legislature in adopting the provisions of the statute requiring the plaintiff to pay costs whenever he recovers less than \$50 in an action that might have been brought in a justice's court was to prevent parties from instituting suits in the courts of record to recover demands really within the

jurisdiction of justices of the peace, by imposing the penalty of payment of costs upon the plaintiff when he fails to recover \$50 or more. It matters not, therefore, what the plaintiff claims in his complaint, if he recovers less than \$50 in a case in which a justice's court has jurisdiction of the subject-matter. The construction we give to our statute seems to be the construction given to a similar provision of the Code of the state of New York by the courts of that state."

In *Laney v. Ingalls*, 5 S. D. 183, 58 N. W. 572, the court says: "The jury found, by its verdict, that defendant was indebted to plaintiff in the sum of \$36.12, which amount was within the jurisdiction of a justice of the peace; and the pleadings show that a justice of the peace could have tried the case had plaintiff claimed no more than he was entitled to recover. By demanding more than was justly due, plaintiff placed his claim beyond the jurisdiction of a justice of the peace; and, when it is found that the amount to which he is entitled is within such jurisdiction, that fact is presumed to have been within his knowledge at the time the suit was instituted, and he ought not to be permitted to deprive the defendant of a speedy and comparatively inexpensive trial in a justice's court, and at the same time burden him with the unnecessary costs and disbursements of a trial in the circuit court." Citing: *Alexander v. Hard*, 42 How. Pr. 131; *Landsberger v. Magnetic Teleg. Co.* 8 Abb. Pr. 35; *Kreuger v. Zirbel*, 2 Wis. 233; *Peet v. Warth*, 1 Bosw. 653; *Mechl v. Schwieckart*, 67 Barb. 599. See also: 11 Cyc. 41 and 5 Standard Proc. p. 878.

To be true, most—if not all—of those cases were suits upon a promissory note, but some of these showed upon their face an amount in excess of the jurisdiction of the justice's court, and the verdict was reduced by counterclaim. The reason for the adoption of this section as given by the South Dakota court applies as well to tort actions as to actions upon promissory notes, and we see no reason for drawing the distinction desired by appellant. It follows, therefore, that the trial court assessed the costs against the proper party, and the judgment is in all things affirmed.

GOLD-STABECK LOAN & CREDIT COMPANY v. E. B. KINNEY, as Trustee in Bankruptcy of N. B. Bailey, P. B. Mulhollam, Carrie Lombard, as Administratrix of the Estate of Geo. Lombard, S. L. Bennett, R. L. Haskins, T. C. Richmond, R. W. Jackman, and S. T. Swanson.

(157 N. W. 482.)

Mortgage — mortgagor — mortgagee — residence of each — indebtedness secured — payable in state where mortgagee lives — land covered — in different state — usury — defense of — indebtedness — laws of state where payable — governed by.

1. A mortgage made by a resident of Wisconsin to a resident of Minnesota and to secure a debt which is payable in Minnesota is, as far as the defense of usury is concerned, governed by the laws of Minnesota even though the land is situated in North Dakota.

Usury — rate of interest — contract — intention of parties — construction — rule.

2. The test of usury under the laws of Minnesota is, "Will the contract, if

Note.—Ordinarily a purchaser of real estate who purchases subject to a usurious encumbrance cannot assert the claim of usury either as a defense or affirmatively, the claim of usury being personal to the mortgagor and those in privity with him; but a purchaser of mortgaged premises encumbered by a usurious mortgage is not estopped from asserting the defense of usury where he purchased without knowledge of the existence of the encumbrance, and the amount thereof was not reserved from the purchase price; and the case above comes within this exception. For cases discussing this rule, see notes in 8 L.R.A.(N.S.) 814 and 48 L.R.A.(N.S.) 840, on the right of a vendee of real estate which is subject to a lien, to raise the question of usury.

On the conflict of laws as to usury, see note in 62 L.R.A. 42.

On commissions charged by lender's agent as usury, see notes in 46 L.R.A.(N.S.) 1157, and 19 L.R.A.(N.S.) 391.

See also note in 55 Am. Rep. 609, on the place where a contract is deemed made within the meaning of the law respecting usury; notes in 81 Am. Dec. 736 and 46 Am. St. Rep. 178, on what transactions are usurious; note in 55 Am. Dec. 392, on what is usury and when it is available as a cause of action or defense; and note in 28 Am. Rep. 491, on who besides the principal debtor may urge the defense of usury.

On the recovery of a voluntary payment, see note in 94 Am. St. Rep. 408.

performed, result in producing to the lender a rate of interest greater than is allowed by law, and was that result intended?"

Laws of Minnesota — where payable — control — agreement — loan of money — usury — bonus — amount of loan — remainder — interest — computed on.

3. When, under the laws of Minnesota, "an agreement" exacts from the borrower a bonus to be paid to the lender for making the loan, that bonus, on the question of usury, must be taken out as of the date when it is to be paid by the terms of the agreement. If payable at the time of advancing the loan, it is for the purpose of determining what rate of interest the agreement reserves to the lender, to be deducted as of that date from the amount of loan nominally agreed upon, and the computations of interest made on the remainder.

Contract — mortgage loan — usurious — void.

4. Contract of mortgage loan examined and held to be usurious and therefore void under §§ 2733 and 2735, Revised Laws of Minnesota.

Contract — avoidance — actual intent — proof of — usury laws of Minnesota — act — necessary consequences of — presumed to intend — rule of.

5. In order to avoid a contract under the laws of Minnesota, it is not necessary that there should be proof of an actual intent to evade the usury laws, but the rule may be applied that one is presumed to intend the necessary consequences of his acts.

Usury — personal defense — borrower — or one in privity — can only plead — lien — purchaser of property — full payment — lien not assumed — defense of — may be pleaded.

6. Though usury is usually a personal defense and can only be pleaded by the borrower or one in privity with him, yet the purchaser of property charged with a usurious lien, who pays his grantor the full purchase price without deducting therefrom the amount of said lien or in any way assuming its payment, may interpose the defense of usury in an action to enforce such lien, and in such case will be deemed to stand in privity of contract and estate with the mortgagor.

Judgment — obtained — illegally — mortgage foreclosure — land — possession — vacation of — appeal — payment — agent authorized to make — duress — absence of — voluntary payment.

7. When a person against whom a judgment is illegally though not fraudulently obtained for the foreclosure of land of which he has the possession, and who has an opportunity to move for a vacation of the judgment or to appeal, writes to his agents to pay the claim, stating that he is "desirous of taking no chances as to the determination of his rights," and there is no proof either

of a mistake of law or of fact on his part, and the only duress is the threatened mortgage sale, such a payment will be deemed voluntary and cannot be recovered.

Opinion filed March 27, 1916.

Action to quiet title to land.

Appeal from the District Court of Adams County, *W. C. Crawford*, J.

Judgment for defendants.

Affirmed as to the defenses, but reversed as to counterclaim of S. L. Bennett.

Statement of facts by BRUCE, J.

This is an action to foreclose a real estate mortgage, the defense being usury, and a counterclaim being interposed by one of the defendants. The findings of fact and conclusions of law of the trial court are as follows:

"I. I find that the defendants N. B. Bailey and Elva B. Bailey, his wife, on the 30th day of March, 1909, at the office of the plaintiff in the city of Minneapolis in the state of Minnesota, executed and delivered to the plaintiff their certain promissory note in writing for the sum of \$5,000; that said note was to become due November 1, 1914, all the interest and the principal of said note to be paid at the office of the plaintiff in the city of Minneapolis in the state of Minnesota, where all of the conditions of said contract were to be performed; that as security for the payment of said note the defendants N. B. Bailey and Elva B. Bailey, his wife, executed and delivered to the plaintiff their real estate mortgage covering the north half and the southeast quarter of section 5, the west half of section 15, southeast quarter of section 9, the southeast quarter of section 27, and the north half of the southwest quarter of section 33, all in township 131 north, of range 97, west of the fifth (5th) principal meridian, Adams county, North Dakota.

"II. That the said note of \$5,000 also provided for the payment of interest at the rate of 6 per cent per annum from date until paid; that the same became due November 1, 1914; that as a consideration for

the execution and delivery of the said note and mortgage, the said N. B. Bailey and wife received but the sum of \$4,500 and some expense money not to exceed the sum of \$75, and as commissions for the making of said loan the plaintiff retained the sum of \$425 cash, and also in addition thereto received a note for the sum of \$600 due November 1, 1909, secured by a second mortgage on the same lands described in the complaint; that the plaintiff furnished its own money for the making of said loan.

"III. That the said \$425 cash so retained by the plaintiff, together with the note and mortgage of \$600, were commissions for the making of said note and mortgage for the sum of \$5,000 and for which no consideration was given therefor to said N. B. Bailey and Elva B. Bailey; that said commissions so retained and given the plaintiff by said Bailey and wife, together with the 6 per cent interest provided for in the \$5,000 note and mortgage, makes the actual loan made to said Bailey and wife draw a rate of interest in excess of the sum of 10 per cent per annum and interest at more than 10 per cent per annum paid for more than one year in advance.

"IV. That thereafter the plaintiff attempted to enforce the collection of the said commission note and mortgage of \$600, and secured under the same a judgment of foreclosure in the district court of Adams county, North Dakota, on the 20th day of May, 1911, and under and by virtue of an execution of foreclosure sale, compelled to pay and did make the defendant S. L. Bennett pay the sum of \$248.08 on the 4th day of August, 1911, to prevent a sale of the S. E. $\frac{1}{4}$ of section 5, the S. E. $\frac{1}{4}$ of section 9, and the S. E. $\frac{1}{4}$ of section 27, in township 131 north, of range 97 west, of the 5th P. M., lands of the defendant Bennett, and lands covered by said commission mortgage; that said judgment of foreclosure was thereafter, and on the 13th day of February, 1912, duly set aside as null and void by the district court of Adams county, North Dakota, and the plaintiff has failed to return to said S. L. Bennett the said sum of \$248.08 and the interest thereon from August 4, 1911.

"V. That on the 4th day of August, 1909, the defendants N. B. Bailey and wife executed and delivered to the defendant J. A. Muhlham their warranty deed in consideration of the sum of \$2,000 for

the N. E. $\frac{1}{4}$ of section 5 of said lands, which deed was duly recorded in the office of the register of deeds for Adams county, North Dakota, on the 21st day of August, 1909, in book 4 of deeds on page 437, and thereafter the defendant J. A. Mulhollam conveyed by warranty deed said lands to the defendant P. B. Mulhollam; that on the 27th day of May, 1907, the defendant S. L. Bennett purchased from the defendant N. B. Bailey and one C. N. Gorham the S. E. $\frac{1}{4}$ of section 5, and S. E. $\frac{1}{4}$ of section 9, and the S. E. $\frac{1}{4}$ of section 27, of said lands, agreeing to pay therefor the sum of \$9,160, and that thereafter said contract was fully performed, and a deed was issued by said N. B. Bailey and wife to said S. L. Bennett for said lands, and said land contract for the sale of said lands and said deed was duly recorded in the office of the register of deeds for Adams county, North Dakota, on the 22d day of December, 1909, in book 5 of deeds on page 106; that the defendant Carrie Lombard is the administratrix of the estate of George M. Lombard, deceased; that the defendant Ralph L. Haskins, on the 23d day of August, 1906, purchased from the defendant N. B. Bailey and said C. N. Gorham the N. $\frac{1}{2}$ of S. W. $\frac{1}{4}$ of section 33 of said lands, and said contract was recorded in the office of the register of deeds for Adams county, North Dakota, on the 22d day of March, 1910, in book 3 of Misc., on page 205; that the defendants T. C. Richmond, R. W. Jackman, and S. T. Swanson are the owners of a sheriff's deed by virtue of an execution sale against the estate of said Geo. M. Lombard, covering the N. W. $\frac{1}{4}$ of section 5 of said lands.

“VI. That all of the answering defendants herein have, since the date of the purchase of the said lands as above set forth and before the commencement of this action and prior to the date of the said \$5,000 note and mortgage, been paying the taxes on said lands.

“VII. That on the 18th day of September, 1909, the plaintiff released from the operation of this mortgage and also from the operation of the said \$600 note and mortgage the W. $\frac{1}{4}$ of section 15 of said lands for a consideration of the sum of \$1,600, \$1,500 of which consideration was applied on the \$5,000 note and mortgage and \$100 was applied on the commission or bonus mortgage.

“VIII. That the plaintiff loaned said sum of \$4,500 given to N. B. Bailey for the \$5,000 note and mortgage its own money, retaining

therefrom the said \$425 cash and the said \$600 note and mortgage as a commission and bonus for the making of the said loan. And as conclusions of law I find:

"I. That the note and mortgage in this action are Minnesota contracts; that the same are usurious and void as to the defendants P. B. Mulhollam, J. A. Mulhollam, Geo. M. Lombard, deceased, and Carrie Lombard, as administratrix of the estate of George M. Lombard, deceased, S. L. Bennett, Ralph L. Haskins, T. C. Richmond, R. W. Jackman, and S. T. Swanson.

"II. That there is due and owing the defendant S. L. Bennett, from the plaintiff, on account of the enforced payment to the plaintiff by said S. L. Bennett, the sum of \$248.08, with interest at the rate of 7 per cent per annum from and after August 4, 1911, as set forth in the counterclaim of the defendant, S. L. Bennett.

"III. That all of the real property described in the complaint sought to be foreclosed and sold under the note and mortgage, to wit: North half (N. $\frac{1}{2}$) of the southeast quarter (S. E. $\frac{1}{4}$) of section five (5), southeast quarter (S. E. $\frac{1}{4}$) of section nine (9), southeast (S. E. $\frac{1}{4}$) quarter of section twenty-seven (27) and the north half (N. $\frac{1}{2}$) of the southwest quarter (S. W. $\frac{1}{4}$) of section thirty-three (33), all in township one hundred thirty-one (131), north of range ninety-seven (97), west of the fifth (5th) principal meridian, should be freed, discharged, and released from the operation of said mortgage, as claimed to be held by said plaintiff as aforesaid.

"It is ordered, adjudged, and determined that the said answering defendants do have judgment against the plaintiff accordingly, and it is further ordered that the defendant S. L. Bennett do have judgment against the plaintiff on his counterclaim for the sum of \$248.08, together with interest thereon at the rate of 7 per cent per annum from and after August 4, 1911; and that these answering defendants do have and recover judgment from the plaintiff herein for their costs and the disbursements of this action to be taxed by the clerk."

From a judgment entered in accordance with these findings and conclusions, this appeal has been taken and a trial *de novo* has been demanded.

Henry Moen and W. A. McDowell, for appellant.

The defense of usury is purely a personal one. No one can take advantage thereof excepting the debtor himself, or someone standing in privity with the debtor. 39 Cyc. 999.

The mere taking of interest in excess of 10 per cent is not of itself usury. *Swanson v. Realization & Debenture Corp.* 70 Minn. 380, 73 N. W. 165; 39 Cyc. 918.

The plaintiff, making and securing the loan, had the right to make a legal charge for all its services rendered in such connection. 39 Am. & Eng. Enc. Law, pp. 946, 981; Webb, Usury, § 81.

There was no device, fraud, or deception used or practised in this case, in securing the loan for defendant or throughout the transaction. *Swanson v. Realization & Debenture Corp.* *supra*.

There must be an intent to violate the law, to constitute usury; when this is absent the transaction is not usurious, whatever its appearance may be. *Ward v. Anderberg*, 31 Minn. 304, 17 N. W. 630; *Jackson v. Travis*, 42 Minn. 438, 44 N. W. 316.

Taking interest in advance for a long time and at the highest rate allowed by law is not usurious. *Fleckner v. Bank of United States*, 8 Wheat. 338, 5 L. ed. 631; *Brown v. Scottish-American Mortg. Co.* 110 Ill. 235; *Stribbling v. Bank of the Valley*, 5 Rand. (Va.) 132; *McGill v. Ware*, 5 Ill. 21; *English v. Smock*, 34 Ind. 132, 7 Am. Rep. 215; *Rose v. Munford*, 36 Neb. 148, 54 N. W. 129; *Tepoel v. Saunders County Nat. Bank*, 24 Neb. 815, 40 N. W. 415.

Where an illegal demand is made on a person and the law affords him adequate protection against it, or gives him a complete remedy, and he pays what is so demanded, such payment is voluntary. 30 Cyc. 1311.

And such voluntary payment, except where the statute otherwise provides, with knowledge of all the facts, and not induced by fraud or improper conduct on the part of the payee, cannot be recovered back. 30 Cyc. 1313.

Or where a person places a wrong construction on the contract, and makes payments thereunder, he cannot recover back. *Cincinnati v. Cincinnati Gaslight & Coke Co.* 53 Ohio St. 278, 41 N. E. 239.

To entitle one to the right to recover back, the payment must have been made on a wrongful or unjust claim or demand, coupled with

pressure of actual or threatened restraint or harm, or of actual or threatened seizure of property and of serious import to him, and that his only escape was payment. *Kraemer v. Deustermann*, 37 Minn. 469, 35 N. W. 276.

But when the law affords to him an adequate remedy, the rule is different. *De Graff v. Ramsey County*, 46 Minn. 319, 48 N. W. 1135; *Joannin v. Ogilvie*, 49 Minn. 564, 16 L.R.A. 376, 32 Am. St. Rep. 581, 52 N. W. 217.

E. C. Wilson, Boem & Jackson, and Aylward, Davis, Olbrich, & Hill, for respondents.

The question of usury can be raised by anyone claiming under and through the obligor in the contract which is tainted with usury, and there is no estoppel. *Grove v. Great Northern Loan Co.* 17 N. D. 352, 138 Am. St. Rep. 707, 116 N. W. 345; *Jones, Mortg.* §§ 1493 and 1494; *Lloyd v. Scott*, 4 Pet. 205, 7 L. ed. 833; *Calkins v. Copley*, 29 Minn. 471, 13 N. W. 904; *Gerdine v. Menage*, 41 Minn. 417, 43 N. W. 91; *Greene v. Tyler*, 39 Pa. 361; *Bachdell's Appeal*, 56 Pa. 386; *Miners Trust Co. Bank v. Roseberry*, 81 Pa. 309.

The deeds from Bailey were silent as to this mortgage, and he knew it was void for usury, and that is the reason why it was ignored in making the deeds. *Shufelt v. Shufelt*, 9 Paige, 145, 37 Am. Dec. 381.

Where a large part of the interest on a long-time loan is deducted in advance, and for the full period, interest thereafter can only be computed on the balance received by the borrower. *Smith v. Parsons*, 55 Minn. 520, 57 N. W. 311; *Carpenter v. Lamphere*, 70 Minn. 542, 73 N. W. 514; *Robinson v. Blaker*, 85 Minn. 242, 89 Am. St. Rep. 541, 88 N. W. 845; *Hagan v. Barnes*, 92 Minn. 128, 99 N. W. 415; *Nelson v. Satre*, 111 Minn. 60, 126 N. W. 399.

The law presumes that one intends the necessary and usual consequences of his act, and no direct proof of actual intent is required. *Swanson v. Realization & Debenture Corp.* 70 Minn. 380, 73 N. W. 165.

The complaint contains the allegation that no action or proceeding at law or otherwise has been had to recover the debt, but there is no proof of this fact. Not only is it necessary to allege this fact, but it must be proved. *Comp. Laws 1913*, § 8103; *Fisher v. Bouisson*, 3

N. D. 493, 57 N. W. 505; *Drury v. Roberts*, 2 Neb. (Unof.) 574, 89 N. W. 600.

The defendant Bennett should be refunded by plaintiff the money paid by him under the prior action, to prevent sale of his land under execution. Minn. Rev. Laws, §§ 2733 and 2735; *Missouri, K. & T. Trust Co. v. McLachlan*, 59 Minn. 468, 61 N. W. 560.

"The test of the question of usury is, "Will the contract, if performed, result in producing to the lender a rate of interest greater than is allowed by law, and was such result intended?" *Smith v. Parsons*, 55 Minn. 520, 57 N. W. 311.

The contract in question is void under the laws of Minnesota. It must be construed under such laws, for their performance was to be made.

"A contract, illegal by the laws of the place of performance, is illegal everywhere." *Kennedy v. Cochrane*, 65 Me. 594; *Jewell v. Wright*, 30 N. Y. 259, 86 Am. Dec. 372; *Philson v. Barnes*, 50 Pa. 230; *Lewis v. Headley*, 36 Ill. 433, 87 Am. Dec. 227; *Akers v. Demond*, 103 Mass. 318; *Newman v. Kershaw*, 10 Wis. 333.

A purchaser of lands who has bought not merely the equity of redemption, but the whole title, paying the full price, with no reduction on account of the mortgage, may set up usury as a defense. *Jones, Mortg.* § 1494; *Camden F. Ins. Co. v. Reed*, — N. J. Eq. —, 38 Atl. 667; *Hallam v. Telleren*, 55 Neb. 255, 75 N. W. 560; *Cobe v. Summers*, 143 Mich. 117, 106 N. W. 707; *Crawford v. Nimmons*, 180 Ill. 143, 54 N. E. 209.

Where there is no agreement or understanding about it, the grantee of a mortgagor may plead usury as a defense to the mortgage debt. *Newman v. Kershaw*, 10 Wis. 335; *Calkins v. Copley*, 29 Minn. 471, 13 N. W. 904; *Gerdine v. Menage*, 41 Minn. 417, 43 N. W. 91; *Lilienthal v. Champion*, 58 Ga. 158; *Union Bank v. Bell*, 14 Ohio St. 200; *Maher v. Lanfrom*, 86 Ill. 513; *Porter v. Parmley*, 52 N. Y. 185; *Banks v. McClellan*, 24 Md. 62, 87 Am. Dec. 594; *M'Alister v. Jermain*, 32 Miss. 142; *Bullard v. Raynor*, 30 N. Y. 200; *Grove v. Great Northern Loan Co.* 17 N. D. 352, 138 Am. St. Rep. 707, 116 N. W. 345.

It is no defense to an action to set aside a mortgage as usurious, that there was no intent on the part of the defendant to evade the usury.

laws. *Brolasky v. Miller*, 9 N. J. Eq. 807; *Magie v. Reynolds*, 51 N. J. Eq. 113, 26 Atl. 150; *Brooks v. Avery*, 4 N. Y. 225; *Lloyd v. Scott*, 4 Pet. 205, 7 L. ed. 833; *Doub v. Barnes*, 1 Md. Ch. 127; *Shufelt v. Shufelt*, 9 Paige, 145, 37 Am. Dec. 381; *Shankland v. Nelson*, 1 Tenn. Ch. 459; *Wightman v. Suddard*, 93 Ill. App. 142; *Mason v. Pierce*, 142 Ill. 331, 31 N. E. 503; *Hagan v. Barnes*, 92 Minn. 128, 99 N. W. 415; *Exley v. Berryhill*, 37 Minn. 182, 33 N. W. 567; *Carpenter v. Lamphere*, 70 Minn. 542, 73 N. W. 514; *Robinson v. Blaker*, 85 Minn. 242, 89 Am. St. Rep. 541, 88 N. W. 845; *Hagan v. Barnes*, 92 Minn. 128, 99 N. W. 415.

In making a contract, the names or forms used are unimportant. There can be no device or shift under or behind which the law will not look to ascertain the real character of the transaction. *Lukens v. Hazlett*, 37 Minn. 441, 35 N. W. 265; *Phelps v. Montgomery*, 60 Minn. 303, 62 N. W. 260; *Scott v. Austin*, 36 Minn. 460, 32 N. W. 89, 864; *Chase v. Whitten*, 51 Minn. 485, 53 N. W. 767; *Widell v. National Citizens' Bank*, 104 Minn. 510, 116 N. W. 919; *Elwell v. Lund*, 102 Minn. 166, 112 N. W. 1009, 1067.

The plaintiff obtained from defendant Bennett a large sum of money, wrongfully and illegally, paid by him under duress, to prevent an unlawful sale under an execution, the judgment afterwards being vacated. Defendant's counterclaim for this money should, in a court of equity, and under the facts here presented, be returned. *National Surety Co. v. Walker*, — Iowa, —, 117 N. W. 1114; *Buford v. Briggs*, 96 Ark. 150, 131 S. W. 351; *Hinchman v. Ripinsky*, 121 C. C. A. 35, 202 Fed. 625; *Northwestern Fuel Co. v. Brock*, 139 U. S. 216, 35 L. ed. 151, 11 Sup. Ct. Rep. 523; *Standard Furniture Co. v. Van Alstine*, 31 Wash. 499, 72 Pac. 119; *Ætna L. Ins. Co. v. Flour City Ornamental Iron Works*, 120 Minn. 463, 139 N. W. 955; *Harrigan v. Gilchrist*, 121 Wis. 127, 99 N. W. 909; *Bank of United States v. Bank of Washington*, 6 Pet. 8, 8 L. ed. 299.

One who obtains and enforces a judgment which is afterwards reversed on law, or set by the trial court from fraud or mistake, may be required to make restitution to the party injured. *Clark v. Pinney*, 6 Cow. 297; *Scholey v. Halsey*, 72 N. Y. 578; *Haebler v. Myers*, 132 N. Y. 363, 15 L.R.A. 588, 28 Am. St. Rep. 589, 30 N. E. 963; *Chambliss v. Hass*, 125 Iowa, 484, 68 L.R.A. 126, 101 N. W. 153, 3 Ann.

Cas. 16; Bank of United States v. Bank of Washington, 6 Pet. 17, 8 L. ed. 304; Sturges v. Allis, 10 Wend. 355; Maghee v. Kellogg, 24 Wend. 32; Norton v. Coons, 3 Denio, 130; Langley v. Warner, 1 Sandf. 209; Cowdery v. London & S. F. Bank, 96 Am. St. Rep. 143, note; Bickett v. Garner, 31 Ohio St. 28; Florence Cotton & Iron Co. v. Louisville Bkg. Co. 138 Ala. 588, 100 Am. St. Rep. 50, 36 So. 456; Chicago & S. E. R. Co. v. Adams, 26 Ind. App. 443, 59 N. E. 1087; Murphy v. Casselman, 24 N. D. 336, 139 N. W. 802.

BRUCE, J. (after stating the facts as above). The main question for determination in this case is whether the loan was tainted with usury.

It is conceded that though the land was situated in North Dakota, both the mortgagor and the mortgagee were nonresidents, the latter living in Wisconsin and the former in Minnesota; that the contract was to be performed in Minnesota, and that therefore, and on the question of usury, the Minnesota, and not the North Dakota, statute will apply.

It is conceded that the statutes of the state of Minnesota on the subject of usury were and are as follows: "Section 2733. The interest for any legal indebtedness shall be at the rate of \$6 upon \$100 for a year, unless a different rate is contracted for in writing; and no person shall directly or indirectly take or receive in money, goods, or things in action, or in any other way, any greater sum, or any greater value, for the loan or forbearance of money, goods, or things in action, *than \$10 on \$100 for one year*; and in the computation of interest upon any bond, note or other instrument or agreement interest shall not be compounded, but any contract to pay interest, not usurious, upon interest overdue shall not be construed to be usury," etc. Rev. Laws 1905.

"Section 2735. All bonds, bills, notes, mortgages, and all other contracts and securities whatsoever, and all deposits of goods, or any other thing, whereupon or whereby there shall be reserved, secured, or taken any greater sum or value for the loan or forbearance of any money, goods, or things in action than hereinbefore prescribed, shall be *void*, except as to bona fide purchasers of negotiable paper, in good faith, for a valuable consideration and before maturity, as hereinafter provided," etc.

It is settled by the supreme court of Minnesota that "the test . . .

[of usury in such a case] is, Will the contract, if performed, result in producing to the lender a rate of interest greater than is allowed by law and was that result intended?" *Smith v. Parsons*, 55 Minn. 520, 57 N. W. 311.

It is also settled that "when the agreement exacts from the borrower a 'bonus' to be paid to the lender for making the loan, that, on the question of usury, must be taken out as of the date when it is to be paid by the terms of the agreement. If payable at the time of advancing the loan, it is, for the purpose of determining what rate of interest the agreement reserves to the borrower, to be deducted as of that date from the amount of loan nominally agreed upon, and the computation of interest made on the remainder." *Ibid.*; *Rantala v. Haish*, — Minn. —, 156 N. W. 666.

If we apply these considerations to the case at bar, there can be no question of the usurious nature of the transaction. Being usurious, the contract was, under the Minnesota law, absolutely void. We are not here called upon to say what would be the law in Minnesota upon the subject if the sum reserved were a legitimate commission to be paid by the borrower for the services of the go-between in inducing some third person to make the loan, as such fact cannot be and is not claimed in this case. According to plaintiff's own witness, Stabeck, the excess sum was retained for "commission and services in negotiating the loan." The loan, however, was admittedly advanced out of plaintiff's own money, and the mortgages and notes were never negotiated or sold. Plaintiff now seeks to collect the full-face value of his notes, and has never at any time offered to return the commission not earned and which he himself says was for "negotiating the sale of the loan." There can indeed be no question that the bonus was retained as interest, and not as commission or as compensation for services rendered.

Nor is there any merit in plaintiff's claim that the bonus of \$1,000 was for services rendered in clearing the title to the land and sending a special examiner to visit the same. Not only is the charge palpably exorbitant for any such a purpose; not only is there no evidence of these expenses or proof of any real services rendered, or of services which could ever amount in value to the amount claimed,—but plaintiff's witness, Stabeck, expressly testifies that a part of the claim at

least was for services or commission in negotiating the loan, which was in fact never negotiated.

His testimony on this point is conclusive against him and his firm. It was:

Q. Now, Mr. Stabeck, I believe you testified that the execution and delivery of the \$600 note and mortgage was a part of the transaction by which you loaned Mr. Bailey this \$5,000 loan secured by the note and mortgage in this action?

A. Yes, sir.

Q. Now, what was this \$600 note and mortgage, what was it for?

A. It was for commission and part of the services for negotiating the loan.

Q. You paid no cash for the \$600 note and mortgage, as I understand it?

A. No, sir.

Q. And this simply represents commission that Mr. Bailey paid to the Gold-Stabeck Land & Credit Company for securing this loan?

A. For commission and services in negotiating the loan, yes, sir.

Q. Well, principally commission, isn't it?

A. No, not any more commission than for services for negotiating the loan for him.

Q. Well, what were the services?

A. Looking up the land title, getting the papers executed and the payment of prior encumbrances, examination of abstracts, *negotiating the sale of the loan.*

Q. Now, whose money was it that you were loaning?

A. *We put our own money into it temporarily until we sold the loan.*

Q. So you made a loan out of your own money for \$5,000, and as commission and services you took a second mortgage of \$600 secured by a mortgage covering the same land?

A. We were to procure Mr. Bailey a loan of \$5,000. We took this \$600 mortgage in connection with it.

Q. Without any additional cash being paid to Mr. Bailey?

A. Yes, sir.

Q. Now, Mr. Stabeck, how much money did you pay Mr. Bailey at the time of the execution and delivery of this \$5,000 note and mort-

gage after you had examined the title and found that it was a first mortgage of record on this land?

A. Read that over.

(Question read.) Now, Mr. Stabeck, how much money did you pay Mr. Bailey at the time of the execution and delivery of this \$5,000 note and mortgage after you had examined the title and found that it was a first mortgage of record on this land?

A. I couldn't say offhand just when the payments were made. It might have been paid before, part of them, and part of them might have been paid afterwards.

Q. Now, I don't think that is responsive to the question. How much money did you pay Mr. Bailey for this \$5,000 loan?

A. Five thousand dollars.

Q. Are you sure of that?

A. Yes, sir, with the exception of a few dollars recording fees and taxes that we paid out, the balance of the money went to him. I will change that. A deduction for some additional commission there that I had forgotten about.

Q. What was that additional commission, Mr. Stabeck?

A. What was the amount?

Q. Yes.

A. *Four hundred dollars.*

Q. What did that represent?

A. *That represented an additional amount for placing the loan and the work we done in connection with it.*

Q. Now, can you testify and tell this court just how much money you did pay Mr. Bailey for this \$5,000 note and mortgage and the \$600 note and mortgage?

A. We paid him \$5,000 less the \$400 and the few dollars recording fees and taxes that we paid for him.

Nor is it necessary, as contended by appellant, at any rate under the laws of Minnesota, that there shall be proof of an actual intent to evade the usury laws. The plaintiff must be presumed to have been cognizant of the laws of Minnesota and to have intended the necessary consequences of its acts, and the natural inferences must be made from these acts. Plaintiff must have intended usury, or at any rate that

the greater part of the so-called bonus should be interest and not compensation for services rendered. Otherwise why, and when it knew it had not sold the mortgage, did it seek on its foreclosure to collect for the commission which it claimed was reserved for services in making the sale?

The case at bar indeed seems to be definitely decided against the appellant, not only by the prior decisions of the Minnesota court, but by the recent case of *Rantala v. Haish*, — Minn. —, 156 N. W. 666, and which was handed down since the argument. This case not only is decisive of the main question before us, but answers in the negative the contention of counsel for appellant that as far as the facts of the case at bar are concerned, the Minnesota decision in *Smith v. Parsons*, 55 Minn. 520, 57 N. W. 311, has been overruled by *Swanson v. Realization & Debenture Corp.* 70 Minn. 380, 73 N. W. 165, and *Commonwealth Title Ins. & T. Co. v. Dakko*, 89 Minn. 386, 94 N. W. 1088.

Plaintiff also claims that the defendant Carrie Lombard does not plead usury and therefore has waived the point. In this counsel is in error. Usury is pleaded.

The same objection is made concerning the defendant Korst. It is true that no defense of usury is pleaded by him. He, however, at no time assumed the mortgage, and his interest is merely under a land contract from the defendant J. B. Mulhollam, the interest in which had been assigned to P. B. Mulhollam. P. B. Mulhollam raised the point in his answer and pleaded the defense, and we think that is sufficient.

We next come to the contention of plaintiff and appellant, that the defense of usury was personal to the mortgagor, Bailey, and cannot be taken advantage of by the defendants in this case.

There is no merit in this contention, and plaintiff only cites one authority in support thereof, which is 39 Cyc. 999. He fails entirely to cite 39 Cyc. 1068 and 1069, which qualifies the statement which is made in 39 Cyc. 999, and which is directly opposed to his contention. The rule is that though usury is usually a personal defense and can only be pleaded by the borrower, or one in privity with him, yet the purchaser of property charged with a usurious lien can allege the usury and defeat the claim when the sale was made free from the usurious lien, and that in such cases "the purchaser is permitted to

defend as against usury on the ground that he stands in privity of contract and estate with the mortgagor." In the case at bar there was no assumption of the mortgage by any of the grantees, nor was the amount of the mortgage deducted from the purchase price, but the full amount was paid in every case. In such cases the law is settled that the defense of usury may be interposed by the purchaser. *Grove v. Great Northern Loan Co.* 17 N. D. 352, 138 Am. St. Rep. 707, 116 N. W. 345; 39 Cyc. 1068, 1069; *Crawford v. Nimmons*, 180 Ill. 143, 54 N. E. 209; *Jones, Mortg.* § 1494.

We now come to the counterclaim of the defendant Bennett, which alleges that before the beginning of the present action the plaintiff had commenced an action against the defendant Bennett and others for the foreclosure of a certain pretended mortgage, arising out of the same transaction, as the mortgage sought to be foreclosed in the present action, and that as a result of said action and on or about April 15, 1911, a judgment was entered for the foreclosure of said pretended mortgage, and ordering and decreeing a sale of the premises, and that pursuant to said judgment the said premises were offered for sale and advertised to be sold by the sheriff of Adams county, North Dakota, on June 19, 1911; that by reason of said judgment and order, the defendant Bennett was compelled to pay and did pay to the clerk of the district court for Adams county the sum of \$248.08 on June 9, 1911, in order to satisfy said judgment and to prevent a sale of the premises. That on February 13, 1912, the said pretended judgment and order of sale based thereon were duly and regularly set aside by the district court of the tenth judicial district of the state of North Dakota; that said sum of \$248.08 has not been repaid and that the defendant Bennett demands judgment for the same.

The question as to whether the defendant S. L. Bennett is entitled to recover on this counterclaim is dependent entirely upon the question whether this was or was not a voluntary payment. Plaintiff maintains, and the proof no doubt shows, that at the time of the payment by Bennett the other defendants were at the time settling the case preparatory to a motion for a new trial or appeal. That the defendant Bennett wrote to his attorney that he did not care to take the risk of future litigation, and preferred to make the payment at that time. The proof shows that the defendant took no part in the proceedings

that led to a reversal of the judgment, though he was made an adverse party in such proceedings and served with notice. Plaintiff maintains that defendant had no legal right to make the payment of \$248.08 and obtain a release of the land he owned from the lien of the mortgage; that the company was under no legal obligation to accept such payment and release the mortgage, and that, though there was no direct evidence of an adjustment, the payment can only be considered to have been made for such a purpose. He maintains that "the general rule is that where an unfounded or illegal demand is made upon a person and the law furnishes him adequate protection against it, or gives him an adequate remedy, instead of taking the protection the law gives him or the remedy it furnishes, he pays what is demanded, such payment is deemed to be a voluntary one." See 30 Cyc. 1311.

We believe that the plaintiff and appellant is correct in this contention, and that the case of *Wessel v. D. S. B. Johnston Land & Mortg. Co.* 3 N. D. 160, 44 Am. St. Rep. 529, 54 N. W. 922, is decisive of the question which is before us. In that case this court held that where a party in possession, and with full knowledge of all the facts, pays to the proper officer the money necessary to redeem certain real estate from a foreclosure sale by advertisement, which sale was made after the lien of the mortgage had been fully satisfied and destroyed, and where such payment is made for the sole purpose of preventing the execution of a deed to the purchaser at the foreclosure sale which would create an apparent cloud upon the title, such payment is voluntary, and cannot be recovered. In passing upon this question this court said: "We deem it a well-settled rule of law that where a party with full knowledge of the facts pays a demand that is unjustly made against him and to which he has a valid defense, and where no special damage or irreparable loss would be incurred by making such defense, and where there is no claim of fraud upon the part of the party making such claim, and the payment is not necessary to obtain the possession of the property wrongfully withheld, or the release of his person, such payment is voluntary and cannot be recovered." This court also in its opinion quoted from the case of *Shane v. St. Paul*, 26 Minn. 543, 6 N. W. 349, where the Minnesota court said: "The execution and delivery of a tax deed in accordance with the alleged threat could work no disturbance of that possession, for being founded upon a judgment

void upon its face, its invalidity could always be shown to defeat any claims that might at any time be asserted under it. There was, therefore, no necessity for plaintiff to make any redemption in order to protect his possession of the property, neither was he required to do so to avoid any injurious consequences which might arise by reason of the apparent cloud which might be cast upon his title, for upon the facts stated he had a perfect and adequate remedy by action for the removal of such apparent cloud whenever created."

There is no proof whatever that the defendant Bennett paid the money through a mistake either of fact or of law, nor on account of an actual or necessary duress of property. "Not having heard from you in the Bailey-Bennett matter," write his lawyers when making payment, "and being desirous of taking no chances as to the termination of our rights, we are inclosing herewith our check in the sum of \$250, the same to be used by you to satisfy our *pro rata* share of the Gold-Stabeck judgment and prevent the sale of the Bennett lands on foreclosure."

The defendant Bennett was in possession, and there is no proof that there was any immediate danger of that possession being interfered with. He had an adequate remedy at law, as the record clearly showed that the plaintiff had in fact no lien as against him, and his codefendants were already preparing the motion which afterwards led to the reversal of the judgment. The case, therefore, comes squarely within the ruling in the case of *Wessel v. D. S. B. Johnston Land & Mortg Co.* just cited.

We are not unmindful of our decision in *Murphy v. Casselman*, 24 N. D. 336, 139 N. W. 802. A perusal of that case, however, will, we believe, clearly distinguish it both from the case of *Wessel v. Johnston Land & Mortg. Co.* supra, and the Minnesota case of *Shane v. St. Paul*. Both of the latter cases indeed are sought to be distinguished therein.

It follows from the above that that part of the judgment of the district court which provides "the defendant S. L. Bennett to have and recover from the plaintiff judgment on his counterclaim for the sum of \$299.96, principal and interest, on the sum of \$248.08, paid to the plaintiff by said defendant, S. L. Bennett, on the 4th day of August, 1911," must be reversed and set aside, and that in all other respects the judgment of the district court must be affirmed.

As against the defendant Bennett, the plaintiff and appellant will be allowed the sum of \$15 for its costs and disbursements upon this appeal. As between the appellant and all other parties to this appeal, the costs and disbursements will be taxed against the appellant. This decision does not affect the rights or pass upon the rights of any of the defaulting defendants.

STATE OF NORTH DAKOTA EX REL. ANDREW MILLER
As Attorney General v. ADDISON LEECH as County Auditor
of Cass County.

(157 N. W. 492.)

Four light, heat, and power companies within Cass county in 1914 were locally assessed. Thereafter and on August 5, 1914, the State Tax Commission also filed purported assessments on said plants, and demanded that its assessment be taken without equalization by the county or state boards of equalization. The auditor, however, certified to the state board of equalization both assessments, those made locally and those filed by the Commission, which board ignored the Tax Commission's assessment, recertifying the assessments as locally assessed. Mandamus was brought to compel reinstatement by the county auditor of the Commission's assessment. The writ was denied by the district court, from which the state appeals.

Subdiv. 14 of § 2088, Comp. Laws 1913, a portion of chapter 302, Sess. Laws 1911, creating the State Tax Commission and defining its powers and duties, declares that "it shall be the duty of the Commission and it shall have authority (subdiv. 14) to assess at their actual value all light, heat, and power companies doing business in the state." The Commission acted under this statute. The county auditor asserts said statute is unconstitutional and void because in operation, as here illustrated, it permits a deprivation of private property without due process of law, contrary to § 13 of our state Constitution and also art. 1 of the 14th Amendment to the United States Constitution. *Held:*

Light, heat, and power companies — assessment — taxation — State Tax Commission — equalization — boards of — auditor — mandamus — statute — constitutionality — due process of law — property — taking without — ministerial officer — defense.

1. The defendant, though but a ministerial officer and not personally inter-
- 33 N. D.—33.

ested in these assessments, must follow the law, and must, under his official oath, determine which assessment of the two is made pursuant to law, and may therefore interpose this defense that the statute is unconstitutional and void under which one of said two conflicting purported assessments is filed.

Due process of law — violation — taxing powers — procedure — governing.

2. Said statute (subdiv. 14, § 2088, Comp. Laws 1913) is unconstitutional as violative of due process of law, because no procedure is provided by law governing the exercise of taxing powers in assessing under said act; and—

Property owners — hearing complaints from — procedure — no provision for — confiscation — due process.

3. Because no opportunity under any law is afforded for a hearing for the property owner to be assessed. He has no opportunity for redress, relief, or correction of error in any erroneous assessment that this Commission might levy; and such unrestricted power of taxation may amount to confiscation of, or its deprivation of, property without due process of law.

Tax Commission — sessions of — property owner — entitled to hearing — relief — extra — legal hearing — meeting of Commission — time and place — notice of — under the law.

4. That the Tax Commission is by statute required to be in session at the state capitol on all business days does not save the statute from being unconstitutional on said ground. The party assessed is entitled to an opportunity to be heard under the law authorizing him to be taxed. No burden is upon him to apply to be heard where the law does not provide for a hearing for him. Nor that he could have been afforded an extra-legal hearing had he applied for relief against an excessive assessment is of no avail. To be valid the statute must provide for and designate the time and place for opportunity to so be heard that the property holder to be assessed, having notice and knowledge of the law, may appear and be heard or be bound by his failure so to do.

Tax proceeding — statute — hearing — party assessed — rights of — arbitrary — due process of law — taking property without.

5. Where no right to such a hearing, before the assessment becomes absolute, is afforded by the law to the party assessed, the tax proceeding and law authorizing it is arbitrary and invalid as contrary to constitutional guarantees against the deprivation of private property without due process of law.

Tax Commission — power — statute — void — assessment — invalid.

6. The State Tax Commission has no power under said void statute to levy or file this assessment, and the same is therefore void.

Opinion filed March 29, 1916.

Appeal from the District Court of Cass County, *Pollock, J.*
Affirmed.

Geo. E. Wallace and F. E. Packard, of the State Tax Commission, for appellant.

The question of constitutionality should not be passed upon. No one can be allowed to attack a statute as unconstitutional who has no interest in it or who is not affected by its provisions. The constitutional guaranties are for the benefit of those whose rights are affected. *State v. McNulty*, 7 N. D. 169, 73 N. W. 87; *Clark v. Kansas City*, 176 U. S. 114, 44 L. ed. 392, 20 Sup. Ct. Rep. 284; *Cooley*, Const. Lim. chap. 196; *Re Wellington*, 16 Pick. 96, 26 Am. Dec. 631; *Lampasas v. Bell*, 180 U. S. 281, 45 L. ed. 530, 21 Sup. Ct. Rep. 368; U. S. Const. 14th Amend. § 1; *State ex rel. New Orleans Canal & Bkg. Co. v. Heard*, 47 La. Ann. 1679, 47 L.R.A. 512, 18 So. 746; *Thoreson v. State Examiners*, 19 Utah, 18, 57 Pac. 175; *Franklin County v. State*, 24 Fla. 55, 12 Am. St. Rep. 183, 3 So. 471; *Com. v. James*, 135 Pa. 480, 19 Atl. 950; *Bassett v. Barbin*, 11 La. Ann. 672; *Smyth v. Titcomb*, 31 Me. 272; *Wright v. Kelley*, 4 Idaho, 624, 43 Pac. 565; *People ex rel. Miner v. Salomon*, 46 Ill. 333; *Braxton County Ct. v. West Virginia*, 208 U. S. 192, 52 L. ed. 450, 28 Sup. Ct. Rep. 275.

The law is not in conflict with the Constitution. Laws 1911, chap. 303, subdiv. 14, § 9; *State ex rel. Faussett v. Harris*, 1 N. D. 190, 45 N. W. 1101.

The real purpose of the Constitution is to secure an assessment of property which shall be credited to the proper assessment districts. Const. § 179; *Missouri River Power Co. v. Steele*, 32 Mont. 433, 80 Pac. 1093; *People ex rel. Park Comrs. v. Detroit*, 28 Mich. 228, 15 Am. Rep. 202; *Davock v. Moore*, 105 Mich. 120, 28 L.R.A. 783, 63 N. W. 424; *Cooley*, Taxn. 2d ed. 62; *Taylor v. Board of Health*, 31 Pa. 73, 72 Am. Dec. 724; *State ex rel. Terre Haute v. Kolsem*, 130 Ind. 434, 14 L.R.A. 566, 29 N. E. 595; *State ex rel. Atwood v. Hunter*, 38 Kan. 578, 17 Pac. 177; *Baltimore v. State*, 15 Md. 376, 74 Am. Dec. 572; *Com. v. Plaisted*, 148 Mass. 375, 2 L.R.A. 142, 12 Am. St. Rep. 566, 19 N. E. 224; *David v. Portland Water Committee*, 14 Or. 98, 12 Pac. 174; *Newport v. Horton*, 22 R. I. 196, 50 L.R.A. 330, 47 Atl. 312.

If the right to reassess and to add assessments could be sustained upon general principles, obviously the right to assess in the first instance can be sustained. *State Tax Comrs. v. Board of Assessors*, 124

Mich. 491, 83 N. W. 209; *Youngblood v. Sexton*, 32 Mich. 406, 20 Am. Rep. 654; *State ex rel. Brown County v. Myers*, 52 Wis. 628, 9 N. W. 777; *Ames v. People*, 26 Colo. 83, 56 Pac. 656; *People ex rel. Metropolitan Street R. Co. v. State Tax Comrs.* 174 N. Y. 417, 63 L.R.A. 884, 105 Am. St. Rep. 674, 67 N. E. 69.

The property here sought to be assessed and subjected to taxation is of a different character from that with which the local assessor is familiar. It has no market value. He does not know by what standard to measure the value of the right and privilege of engaging in the business. He cannot determine the value of the plant which is connected with that right. The law is not local or special in nature. *Ames v. People*, 26 Colo. 83, 56 Pac. 656; *State Assessors v. Central R. Co.* 48 N. J. L. 146, 4 Atl. 576; *Chicago & N. W. R. Co. v. State*, 128 Wis. 553, 108 N. W. 557; *Pacific Exp. Co. v. Seibert*, 142 U. S. 339, 35 L. ed. 1035, 3 Inters. Com. Rep. 810, 12 Sup. Ct. Rep. 250.

The act is uniform in its operation. The constitutional requirement of uniformity does not interfere with or prohibit classification. The restriction relates only to the rate or amount of taxation and its incidents, upon taxable persons and property, but no limit is placed on the mode of levying and collecting the taxes imposed. *Chicago & N. W. R. Co. v. State*, 128 Wis. 553, 108 N. W. 557; *Wilcox v. Eagle Twp.* 81 Mich. 271, 35 N. W. 987; *Central P. R. Co. v. State Bd. of Equalization*, 60 Cal. 35; *Ducat v. Chicago*, 48 Ill. 172, 95 Am. Dec. 529; *Merchants' & Mfrs. Nat. Bank v. Pennsylvania*, 167 U. S. 461, 42 L. ed. 236, 17 Sup. Ct. Rep. 829; 37 Cyc. 746, and cases cited; *Central Iowa R. Co. v. Wright County*, 67 Iowa, 199, 25 N. W. 128; *Sterling Gas Co. v. Higby*, 134 Ill. 557, 25 N. E. 660; *Pittsburgh, C. C. & St. L. R. Co. v. Backus*, 133 Ind. 625, 33 N. E. 432; *Reagan v. Farmers' Loan & T. Co.* 154 U. S. 420, 38 L. ed. 1031, 4 Inters. Com. Rep. 578, 14 Sup. Ct. Rep. 1062; *New York v. Barker*, 179 U. S. 279, 45 L. ed. 190, 21 Sup. Ct. Rep. 121.

The act does not deny the equal protection of the law. *Cincinnati, N. O. & T. P. R. Co. v. Kentucky*, 115 U. S. 321, 29 L. ed. 414, 6 Sup. Ct. Rep. 57; *Florida, C. & P. R. Co. v. Reynolds*, 183 U. S. 471, 46 L. ed. 283, 22 Sup. Ct. Rep. 176; *Bell's Gap R. Co. v. Pennsylvania*, 134 U. S. 232, 33 L. ed. 892, 10 Sup. Ct. Rep. 533; *Michigan R. Tax Cases*, 138 Fed. 236; *Michigan C. R. Co. v. Powers*, 201

U. S. 246, 50 L. ed. 744, 26 Sup. Ct. Rep. 459; *Coulter v. Louisville & N. R. Co.* 196 U. S. 599, 49 L. ed. 615, 25 Sup. Ct. Rep. 342; *State R. Tax Cases*, 92 U. S. 575, 23 L. ed. 663; *Kentucky R. Tax Cases*, 115 U. S. 321, 29 L. ed. 414, 6 Sup. Ct. Rep. 57.

The provision for assessing light, heat, and power property does not deprive the owners of property without due process of law. *New York ex rel. Hatch v. Reardon*, 204 U. S. 159, 51 L. ed. 422, 27 Sup. Ct. Rep. 188; *The Winnebago (Iroquois Transp. Co. v. De Laney Forge & Iron Co.)* 205 U. S. 354, 51 L. ed. 836, 27 Sup. Ct. Rep. 509; *California Reduction Co. v. Sanitary Reduction Works*, 199 U. S. 306, 50 L. ed. 204, 26 Sup. Ct. Rep. 100; *Jaenhne v. New York*, 128 U. S. 189, 194, 32 L. ed. 398, 400, 9 Sup. Ct. Rep. 70; *Pittsburgh, C. C. & St. L. R. Co. v. Backus*, 133 Ind. 625, 33 N. E. 432; *State R. Tax Cases*, 92 U. S. 610, 23 L. ed. 672; *Merchants' & Mfrs. Nat. Bank v. Pennsylvania*, 167 U. S. 461, 466, 42 L. ed. 236, 238, 17 Sup. Ct. Rep. 829; *Hagar v. Reclamation Dist.* 111 U. S. 701, 28 L. ed. 569, 4 Sup. Ct. Rep. 663; *Bell's Gap R. Co. v. Pennsylvania*, 134 U. S. 232, 33 L. ed. 892, 10 Sup. Ct. Rep. 533; *Paulsen v. Portland*, 149 U. S. 30, 37 L. ed. 637, 13 Sup. Ct. Rep. 750; *Glidden v. Harrington*, 189 U. S. 255, 47 L. ed. 798, 23 Sup. Ct. Rep. 574; *Michigan C. R. Co. v. Powers*, 201 U. S. 245, 50 L. ed. 744, 26 Sup. Ct. Rep. 459.

"A majority of the members of the Tax Commission shall constitute a quorum for the transaction of business and the performance of the duties of the Commission." *Comp. Laws 1913*, § 2085; *Laws 1911*, chap. 303, § 6; *Gallup v. Schmidt*, 183 U. S. 300, 307, 46 L. ed. 207, 213, 22 Sup. Ct. Rep. 162.

The property owners had opportunity to be heard, but this is immaterial. They were notified of the assessment. The record being silent upon this point, the court can only presume that the thing was done which in fact should have been done by the officers. *Oliver v. Monona County*, 117 Iowa, 43, 90 N. W. 510; *Gilmore v. Hentig*, 33 Kan. 156, 5 Pac. 781; *State, Tims, Prosecutor, v. Newark*, 25 N. J. L. 399; *Wilson v. Salem*, 24 Or. 504, 34 Pac. 9, 691; *Paulsen v. Portland*, 149 U. S. 30, 37 L. ed. 637, 13 Sup. Ct. Rep. 750; 2 *Lewis's Sutherland Stat. Constr.* § 443; *State ex rel. Bank v. Covington*, 35 S. C. 245, 14 S. E. 499; *Cincinnati v. Connor*, 55 Ohio St. 82, 44 N. E. 582; 36

Cyc. 1147; *State v. Omaha Elevator Co.* 75 Neb. 648, 106 N. W. 979, 110 N. W. 874.

Fowler & Green, for respondent.

The defendant here can properly raise the question of the constitutionality of the law in question, because no such argument was made in the lower court, where the case was tried exactly upon this theory. This theory cannot be changed in the supreme court. *Delaney v. Western Stock Co.* 19 N. D. 630, 125 N. W. 499.

A ministerial officer who is directly responsible for his official acts may set up the unconstitutionality of a statute in a mandamus proceeding to compel him to enforce it, if the courts have not established its constitutionality. *State ex rel. University of Utah v. Candland*, 36 Utah, 406, 24 L.R.A.(N.S.) 1260, 140 Am. St. Rep. 834, 104 Pac. 285; *McDermont v. Dinnie*, 6 N. D. 278, 69 N. W. 294; *Hindman v. Boyd*, 42 Wash. 17, 84 Pac. 609; *Van Horn v. State*, 46 Neb. 62, 64 N. W. 365; *Norman v. Kentucky Bd. of Managers*, 93 Ky. 537, 18 L.R.A. 556, 20 S. W. 901; *Denman v. Broderick*, 111 Cal. 96, 43 Pac. 516; *Brandenstein v. Hoke*, 101 Cal. 131, 35 Pac. 562; *Com. ex rel. Atty. Gen. v. Mathues*, 210 Pa. 372, 59 Atl. 961; *State ex rel. McCurdy v. Tappan*, 29 Wis. 664, 9 Am. Rep. 622; *People ex rel. Scott v. Chenango*, 8 N. Y. 317; *State ex rel. Pell v. Newark*, 40 N. J. L. 71; *Lakewood Twp. v. Brick Twp.* 55 N. J. L. 275, 26 Atl. 91; *Maynard v. First Representative Dist.* 84 Mich. 228, 11 L.R.A. 332, 47 N. W. 756.

The assessment of light, heat, and power companies, under the law in question, is local, and same shall be assessed by the assessor of the locality where same may be situated, and the board of tax commissioners has no jurisdiction or power to make such assessment, and the law attempting to invest in such board such power is unconstitutional. Const. § 179; *People v. Placerville & S. Valley R. Co.* 34 Cal. 656; *Savings & L. Soc. v. Austin*, 46 Cal. 416; *People v. Sacramento County*, 59 Cal. 321; Cal. Const. art. XIII., § 10.

By the very express terms of the Constitution, all other property, except railroad property, shall be locally assessed. Cal. Const. § 10, art. XIII.; *San Francisco v. Central R. Co.* 63 Cal. 467, 49 Am. Rep. 98; *People v. Pittsburg R. Co.* 67 Cal. 625, 8 Pac. 381.

This law had been construed by the California courts, when adopted, and, since its adoption, it has been again construed. *San Francisco &*

S. M. Electric R. Co. v. Scott, 142 Cal. 222, 75 Pac. 575; Const. art. 10, § 179.

Assessors in California are not constitutional officers. The condition in this respect there is the same as in this state. Cal. Const. 1879, § 5, art. II; 1 Deering's Anno. Codes of Cal.; Const. § 173; More v. The Courier News, 29 N. D. 385, 151 N. W. 2.

Assessment is the making out of a list of property and fixing its valuation or appraisement. Seymour v. Peters, 67 Mich. 415, 35 N. W. 62; Allen v. McKay & Co. 120 Cal. 332, 52 Pac. 831; State ex rel. Morse v. Cornwell, 40 S. C. 26, 18 S. E. 184; Eide v. Clarke, 57 Minn. 397, 59 N. W. 484.

Section 173 of our Constitution embodies the doctrine of "home rule" as applied to constitutional officers therein named, and applies to the assessment of property by local assessors. Ex parte Corliss, 16 N. D. 470, 114 N. W. 962; Blomquist v. Bannock County, 25 Idaho, 284, 137 Pac. 174; People v. Raymond, 37 N. Y. 428; Vallely v. Park Comrs. 16 N. D. 25, 15 L.R.A.(N.S.) 61, 111 N. W. 615.

The effect of this law is to single out this particular class of companies and provide a special mode of assessment for them. It amounts to class legislation, as between the companies named and other corporations, but it discriminates against "companies" owning and operating "light, heat, and power" property, in favor of "individuals" owning and operating such property. It applies to corporations, and not to individuals. Edmonds v. Herbrandson, 2 N. D. 274, 14 L.R.A. 725, 50 N. W. 970; State ex rel. Richards v. Hammer, 42 N. J. L. 439; Angell v. Cass County, 11 N. D. 265, 91 N. W. 72; Fidelity Trust Co. v. Vogt, 66 N. J. L. 86, 48 Atl. 580; State ex rel. Wyatt v. Ashbrook, 154 Mo. 375, 48 L.R.A. 265, 77 Am. St. Rep. 765, 55 S. W. 627; Juniata Limestone Co. v. Fagley, 187 Pa. 193, 42 L.R.A. 443, 67 Am. St. Rep. 579, 40 Atl. 977; Fox's Appeal, 112 Pa. 337, 4 Atl. 149.

The law or section is also unconstitutional because it violates the "due process" provisions of both state and Federal Constitutions. Power v. Larabee, 2 N. D. 150, 49 N. W. 724; Winona & St. P. Land Co. v. Minnesota, 159 U. S. 535, 40 L. ed. 251, 16 Sup. Ct. Rep. 83; Santa Clara County v. Southern P. R. Co. 9 Sawy. 165, 18 Fed. 411; Cooley, Taxn. p. 266; Violet v. Alexandria, 92 Va. 561, 31 L.R.A. 382, 53 Am. St. Rep. 825, 23 S. E. 909; Stuart v. Palmer, 74 N. Y.

183, 30 Am. Rep. 289; *Central R. Co. v. Wright*, 207 U. S. 127, 52 L. ed. 134, 28 Sup. Ct. Rep. 47, 12 Ann. Cas. 463.

"Due process requires that the person assessed have notice or opportunity to be heard at some time before the charge becomes fixed and absolute against him." 8 Cyc. 1134, and cases; *Londoner v. Denver*, 210 U. S. 373, 52 L. ed. 1103, 28 Sup. Ct. Rep. 708; *Stuart v. Palmer*, 74 N. Y. 183, 30 Am. Rep. 289; *Security Trust & S. V. Co. v. Lexington*, 203 U. S. 332, 51 L. ed. 208, 27 Sup. Ct. Rep. 87.

The local boards of equalization have no authority to pass upon the work of the Tax Commission, and hence such Commission cannot bring to its aid any statute relating to the powers and duties of such local boards. It is elementary that the opportunity for hearing must be before a board which has power and authority to act, and the law in question affords no such opportunity. *First Nat. Bank v. Lewis*, 18 N. D. 390, 121 N. W. 836; *Cooley, Taxn.* pp. 364, 365, and cases cited; *Power v. Larabee*, 2 N. D. 160, 49 N. W. 724.

The act is so indefinite and uncertain with respect to the power of assessment that it is incapable of intelligent construction, and is void. It fails to provide the time when or the manner in which such assessment shall be made, or for the listing of property by such companies, or for any review or equalization of the assessments. *State ex rel. Wyatt v. Ashbrook*, 154 Mo. 375, 48 L.R.A. 265, 77 Am. St. Rep. 765, 55 S. W. 627.

Holding that § 14 is void does not mean that the entire law is void. *Blomquist v. Bannock County*, 25 Idaho, 284, 137 Pac. 174.

Goss, J. This is an appeal from an order of the district court of Cass county quashing an alternative writ of mandamus against the county auditor. Assessments of certain light, heat, and power companies, all within Cass county, are involved. In 1914 all of said properties were assessed locally in the same manner as ordinary property there situated. Said assessments were reviewed by the local taxation boards, and acted upon by the county board of equalization, and equalized at the following amounts, to wit:

Union Light, Heat & Power Company, of Fargo, Franchise and Personal Property	\$120,000
W. J. Thompson, at Village of Page	390
Hallett & Lynch, at Casselton	1,500
Hunter Light & Power Company, at Hunter	850

The Fargo company was also assessed on its real estate, besides its franchise and personal property, \$32,170. Said assessments as to personalty and franchises were thus established by the local taxing officials and boards in said amounts. On August 5 or 6, 1914, the State Tax Commission, acting pursuant to chap. 303 of the Session Laws of 1911 (subdiv. 14, § 2088, Comp. Laws 1913), filed in the office of the defendant auditor a purported assessment made by said Commission wherein it assessed "the franchise and physical properties constituting the public utilities owned by the Union Light, Heat, & Power Company of the city of Fargo at the sum of \$152,000; those owned by W. J. Thompson, of the Village of Page, at the sum of \$683; those owned by Hallett & Lynch, of the city of Casselton, at the sum of \$1,620; those owned by the Hunter Light & Power Company at the sum of \$850." Thus the assessed value for taxation purposes of three of these four properties was raised \$42,420.

The county auditor (quoting from his return herein) thereupon "certified to the state board of equalization the said pretended assessment so certified to him by said Tax Commission, together with the assessment as equalized by the county board of equalization; that said state board of equalization at their regular August, 1914, session considered and had before it the said pretended assessment of said Tax Commission and the assessment regularly and legally certified to it by said county auditor, and, in the manner prescribed by law, reviewed and considered the two assessments made as aforesaid, and equalized the assessment and valuation thereof at the figures certified to it by defendant, and not at the figures certified by said Tax Commission," and that "unless otherwise ordered the county auditor will distribute and collect the taxes upon said property for 1914 according to the value as so fixed by local taxation and recertified by the state board of equalization." The Commission has brought this proceeding to enforce compliance with its assessment, insisting that under the powers conferred by chap. 302, Session Laws 1911, §§ 2088 to 2090 inclusive, Comp. Laws 1913, and particularly subdiv. 14 of § 2088, Comp. Laws 1913, it has the sole and exclusive power to assess these properties for taxation. On the merits, then, the question is, Which one of two authorities, *i. e.*, the local or the Tax Commission, has the exclusive power to assess "all heat, light, and power companies doing business in this state?"

But before the merits are reached, a preliminary question must be considered which might be decisive of the case, dependent on the way it is decided. The Commission assert that as constitutional guaranties are for the benefit of those whose rights are affected, and as a general rule cannot be taken advantage of by any other person than one so interested, this defendant as county auditor has no personal interest in the tax in question, and hence has no duty other than to follow the last word of the legislature on the matter at hand (chap. 302, Session Laws 1911), and cannot be heard to assert the unconstitutionality of said statutes as a defense to mandamus.

Thus arises a perplexing question upon which the courts in the various jurisdictions are much divided, if not in hopeless conflict. For every decision upon one side of the question one can be found on the other. Two basic lines of reasoning are pursued. The one, that an unconstitutional statute is not law for any purpose, and therefore can be challenged by anyone in any direct proceeding. The other rule, supported by the greater weight of authority, is based largely upon governmental policy, and virtually prohibits a ministerial officer from challenging the constitutionality of a legislative act, except where he is personally interested, as, by reason of a disbursement to be made thereunder for which he is financially responsible. This upon the theory in the main that courts should accept as final the acts of the legislature and discourage attacks upon them, except where necessary to protect the private interests of the individual asserting invalidity and peculiarly and particularly affected thereby. Under the great weight of authority this public official could not, under ordinary circumstances, raise this question in mandamus. *Dean v. Dimmick*, 18 N. D. 397, 122 N. W. 245; 26 Cyc. 156; and notes in 47 L.R.A. 512-519; 24 L.R.A. (N.S.) 1260; and 34 L.R.A. (N.S.) 1060. Thus he could not have raised it of his own volition had no other assessment been attempted or made than an assessment of these parties by the State Tax Commission. He could not have refused to obey the commands of the Commission arbitrarily or capriciously, for the mere purpose of having a mooted point of law decided in this assessment matter, and in the absence of a court decision passing upon the constitutionality of this act. But under the circumstances in which this official found himself placed, one or the other alternative must be followed. He must choose and un-

der his official oath must follow the law to the best of his ability. And when acting as he has here, inasmuch as he is represented throughout these proceedings by the state's attorney of the county, elected to advise him with other county officials in such dilemmas, his decision under legal advice upon the law is required by these petitioners. State ex rel. Wiles v. Williams, 232 Mo. 56, 34 L.R.A.(N.S.) 1060, 133 S. W. 1. And under such circumstances, in a matter of this importance, he may invoke the unconstitutionality of the law under which an apparently regular proceeding by taxation, a prima facie valid tax, has resulted and is sought to be overthrown by a purported substituted assessment. "In cases where the duty to perform an act depends solely on the question whether a statute or ordinance is constitutional and valid, the question may sometimes be determined on a petition for mandamus." 26 Cyc. 156. While courts should be slow to entertain suits invoking constitutionality, yet the circumstances here are exceptional and unusual. The public is interested in having a decision upon who has the power to assess this class of public utilities. Every county auditor and many other local taxing officials are confronted yearly with this question, as is every owner of this class of property throughout the state. The matter might be considered as involving questions *publici juris*. The merits will therefore be passed upon.

As a basis for the attack on the constitutionality of chap. 303, Session Laws 1911, certain parts thereof have been specified as violative of our fundamental law. It is necessary to notice but one of them to render this decision. Reference is had to a portion of the third specification of unconstitutionality in the return to the writ. It is there asserted that the statutes in question "violate § 13 of the Constitution of North Dakota, which prohibits a person or corporation from being deprived of property without due process of law." This attacks the assessment as made under subdivision 14 of § 9 of said chap. 303, Sess. Laws 1911 or subdiv. 14 of § 2088, Comp. Laws 1913. The portions of that section material to inquiry read: "It shall be the duty of the Commission and it shall have power and authority (subdiv. 14) to assess at their actual value all light, heat, and power companies doing business in the state." The objections to this assessment made pursuant to this statute upon property concededly within the statutory classification are many. Respondent asserts that it is violative of due process of law in

the taxation of property, in that at no place or stage of proceedings is the owner of property assessed afforded an opportunity to question the validity of and the amount of the assessment or tax; nor is any provision made as to how or when such assessment must be made; nor upon what method for ascertainment of value. With this are also embodied constitutional questions under § 179 of the state Constitution, as to the authority of a taxing power without the county, city, or municipality wherein this class of property is situated to assess, the Constitution providing that such property "shall be assessed in the county, city, township, village, or district in which it is situated, in the manner prescribed by law." This constitutional question is not necessary of decision. Should the statute be held unconstitutional on these grounds, much, if not all, of the powers of the Tax Commission other than those of a strictly advisory kind, would be annulled. On other grounds of due process urged as violated by subdivision 14, the Commission was without authority thereunder to make this purported assessment. It is noticeable that by this enactment a new method by a new taxing power is attempted as to this class of property. It is an attempt to supersede local taxing authorities by a central state taxing power. It is in no sense the supplementing of the taxing power of the various municipalities and counties. Rather is it the curtailing of their powers by vesting them in one constituted authority with wide open powers in such respect. Necessarily, then, there was no procedure at the time of the passage of chap. 303, Session Laws 1911, provided or outlined under which this entirely new scheme of taxation was empowered to proceed. Instead, a bare power to tax, coupled with a declared duty to assess, was given this Board, but without further definition of how it should proceed, when it should assess, what notice to the property holder should be afforded, nor as to what redress or relief he should have, nor when nor how available. None of these essential and distinguishing features between taxation and confiscation are provided. On the contrary all are left to supposition, or rather are wholly undefined by the law itself. No precedent can be found upholding an assessment levied under similar circumstances.

The Commission urges strenuously that this new enactment must be read in the light of existing revenue statutes which are to be taken as declaratory of procedure in the absence of further directions in said

chap. 303 itself. Concededly true. But nowhere in the revenue laws is there any provision under which this Commission has levied this purported assessment. How did it value these public utilities and from what did it ascertain its knowledge? It may be assumed that it personally visited the plants by its representative, but by what returns and data were the values fixed? Were the owners afforded an opportunity of listing their properties; if so, how and where and before what representative of the board and under what law? Then, again, if the ordinary revenue statutes apply, why was not this assessment filed earlier and submitted for review and equalization? The answer is found in the briefs and in the memorandum opinion of the trial judge,—that the Commission claim to have the final authority “to utter the last word,” and that “there is no necessity for a review of its acts.” Taken, then, at its own contention, further illustrated by the fact that it did not file this assessment until too late for any review and equalization by the local boards, it is established that in substantially all vital respects it is not within, and was not intended to be controlled by, any present laws governing the manner of and procedure in general taxation. That it can at the late date it did file its purported assessment, and claim to act under legal sanction but concededly in absence of any law applicable, is the best and conclusive evidence that in so acting it was without the law, *i. e.*, necessarily proceeding entirely on its own volition, with the law entirely undefined as to how and when and where, under what circumstances, upon what information, and how ascertained, and upon what notice, and with what opportunity for redress, relief, or correction of error was this purported assessment made. All of these being indefinite as not provided for by statute, no opportunity could have been given the owner to be heard, and the Commission could not possess the power to formulate, levy, or file a valid assessment.

But it contends that such an opportunity was afforded for relief. Under the statutes creating it and declaring its duties, it is provided that “said Commission shall be in continuous session, and open for the transaction of business every day, except Sundays, and legal holidays; and the sessions of such Commission shall stand, and be deemed to be adjourned from day to day, without formal entry thereof upon its records. The Commission may hold sessions, or conduct investigations at any place other than the capitol when deemed necessary to facilitate

the performance of its duties. Individual members of the Commission may, upon direction of said Commission, likewise, conduct hearings and investigate at any other place than the capitol." Section 6 of said chapter 303. It contends that, as it was obliged to always be in session at the state capitol, the property owner had notice of that fact, and could apply to it at any time for relief, and was thus afforded an opportunity at all times to be heard prior to or after assessment. But this is not the notice or opportunity necessary. The duty is not upon the taxpayer to obtain his day in court, but instead the law must afford him such opportunity, and, where it does not, a conclusive presumption of prejudice therefrom arises. It is not what the Board may do or may have done, but it is the *opportunity that the law affords* a taxpayer to thereunder protect his property by a hearing guaranteed and provided by law, that satisfies the constitutional right that his property shall not be taken except by due process of law. Notice by the Board without sanction of law therefore is not notice, and is no step in taxation proceeding, and cannot answer the requirement that property can only be taxed and taken thereunder by due process of law. This was early decided in *Power v. Larabee*, 2 N. D. 141, 49 N. W. 724. When speaking of sessions of the board of equalization the court in the syllabus says: "The public is not chargeable with notice of any meeting of such board, except that designated in the statute. Taxpayers are invited by the law to attend at an appointed session of the board and present to the board any grievances which they may have on account of assessments made on their property. No other opportunity for a hearing is given, and if no session is had at the time and place prescribed there is no chance to be heard at all. This is fatal to the tax in all cases where the law bases the tax upon an official valuation and in terms gives the taxpayer an opportunity to be heard. Actual injury need not be shown; the law will presume an injury on grounds of public policy." And at page 156 of the state report is found the following: "Preliminary steps have been taken to make a valid assessment, but they have not been consummated. The sovereign through its agent, the assessor, has apprised the citizen by the assessment and its proper return to the proper office that in the apportioning of the levy his property will be valued at a certain sum. So far he has had no hearing. The law provides for this at a later date. Is the arti-

trary valuation of the assessor without the chance of contesting its accuracy a complete assessment? If so, then the allegation of the plaintiff is a final judgment against the defendant without any hearing or opportunity to be heard. The assessment is no more than the statement of the case of the public against the citizen as to the valuation of his property as the basis of taxation. Final judgment can be pronounced—the assessment can be regarded as final and complete—only after an opportunity for hearing has been accorded. Then and only then is there a legal assessment.” At page 157 this is found: “There is nothing in the suggestion that the plaintiff should have shown that he made an attempt to be heard. The law does not require that the citizen should perform an idle ceremony to protect a constitutional right. . . . *Where there is no legal right to be heard under the law, there is a conclusive presumption that the assessment is unjust. The law stigmatizes as arbitrary every such proceeding.*” Concededly under no law is the person to be taxed required to appear at the state capitol before this board, either at a time set by the Board or at his own convenience. Hence his appearance before that Board would not be an appearance “under the law.” And what is here said does not take into consideration any rights that an owner of this class of property may have that his “property shall be assessed within the county in which the property is located” (Const. § 179), i. e., by local taxation machinery, and before which he may have an opportunity to appear in his own county or municipality, and there, and not at a state capital hundreds of miles distant, seek to correct any overvaluation or disproportionate assessment. *Blomquist v. Bannock County*, 25 Idaho, 284, 137 Pac. 175, at 181.

It is difficult to understand how any other conclusion can be drawn under elementary principles of taxation, than that the effect of the statute, as shown by its interpretation by the appellants by what they have done thereunder in this purported assessment, is a deprivation of property under guise of taxation and without due process of law because of an entire want of an opportunity of the property owner to be heard during the course of proceedings, and before the purported tax shall have become absolute. “Speaking generally, his right under the ‘due process of law’ clause of the Constitution is limited to a hearing at some stage or in some form or proceeding before the tax or

assessment becomes absolute or incontestable, upon the question of whether his property is subject to the tax as fixed or declared by the legislature or council, and the amount or proportion of the tax which his property must bear in relation to other properties similarly assessed." 4 Dill. Mun. Corp. § 1365. While due process of law in taxation is different under Federal and state Constitutions, the former being less exacting and more easily satisfied (11 Enc. U. S. Sup. Ct. Rep. at page 508 and notes), yet under Federal holdings this assessment is void. *Londoner v. Denver*, 210 U. S. 373, 384, 52 L. ed. 1103, at page 1112, 28 Sup. Ct. Rep. 708. The following is there found: "But where the legislature of a state, instead of fixing the tax itself, commits to some subordinate body the duty of determining whether, in what amount, and upon whom it shall be levied, and of making its assessment and apportionment, due process of law requires that, at some stage of the proceedings, before the tax becomes irrevocably fixed, the taxpayer shall have an opportunity to be heard, of which he must have notice, either personal or by publication or by a law fixing the time and place of the hearing." Citing *Hagar v. Reclamation Dist.* 111 U. S. 701, 28 L. ed. 569, 4 Sup. Ct. Rep. 663; *Kentucky R. Tax Cases*, 115 U. S. 321, 29 L. ed. 414, 6 Sup. Ct. Rep. 57; *Winona & St. P. Land Co. v. Minnesota*, 159 U. S. 526-537, 40 L. ed. 247-251, 16 Sup. Ct. Rep. 83; *Glidden v. Harrington*, 189 U. S. 255, 47 L. ed. 798, 23 Sup. Ct. Rep. 574; *Hibben v. Smith*, 191 U. S. 310, 48 L. ed. 195, 24 Sup. Ct. Rep. 88; *Security Trust & S. V. Co. v. Lexington*, 203 U. S. 323, 51 L. ed. 204, 27 Sup. Ct. Rep. 87; *Central R. Co. v. Wright*, 207 U. S. 127, 52 L. ed. 134, 28 Sup. Ct. Rep. 47, 12 Ann. Cas. 463. "Many requirements essential in strictly judicial proceedings may be dispensed with in proceedings of this nature. But even in here a hearing, in its very essence, demands that he who is entitled to it shall have the right to support his allegations by argument however brief; and, if need be, by proof however informal. *Pittsburgh, C. C. & St. L. R. Co. v. Backus*, 154 U. S. 421-426, 38 L. ed. 1031-1036, 14 Sup. Ct. Rep. 1114; *Fallbrook Irrig. Dist. v. Bradley*, 164 U. S. 112-171, et seq. 41 L. ed. 369-393, 17 Sup. Ct. Rep. 56." See also *Soliah v. Cormack*, 17 N. D. 393, 117 N. W. 125, 222 U. S. 522, 56 L. ed. 294, 32 Sup. Ct. Rep. 103, and 8 Cyc. 1134.

If the power of the Commission to make this assessment be upheld by the precedent so announced, the door will be closed against the property owner being afforded an opportunity outside of the courts to obtain relief from disproportionate or excessive valuation or kindred injustices arising from perhaps arbitrary or capricious action of taxing authorities. The State Tax Commission has no power to assess under § 14 of the act in question.

As this case is between public officials, all acting in good faith attempting to perform what they understood to be duties of office, "it would be unjust to mulct them for mistakes of the legislature." State ex rel. Rusk v. Budge, 15 N. D. 205, 106 N. W. 293. Hence no costs will be allowed to either party. The judgment is affirmed.

HANS H. KOLOEN v. PILOT MOUND TOWNSHIP, a Public Corporation, S. J. Tande, Charles Johnson, Gunder Trusta, as Supervisors of said Pilot Mound Township, a Public Corporation, and as Road Overseers therein.

(L.R.A.—, —, 157 N. W. 672.)

Public highways — across public lands — congressional grant of — acceptance — user by the public — highway established — public authorities — positive act by — intent to accept — manifest.

In order to constitute an acceptance of the congressional grant of right of way for public highways across public lands, there must be either user by the public for such a period of time and under such conditions as to establish a highway under the laws of this state, or there must be some positive act or acts on the part of the proper public authorities clearly manifesting an intent to accept such grant with respect to the particular highway in question.

Opinion filed March 29, 1916.

Note.—The annotation to *Vogler v. Anderson*, referred to in this opinion, in 9 L.R.A.(N.S.) 1223, on the effect of the mere use of a highway over the public domain as acceptance of the grant of the right of way, gives several other cases in accord with the case above; the case itself holding, as here, that the establishment of the public highway in some manner provided by statute is necessary to constitute an acceptance of the congressional grant of a right of way across public land and perfect the grant; and therefore a mere user short of the time necessary to establish title by adverse possession is not sufficient.

33 N. D.—34.

From a judgment of the District Court of Griggs County, *Coffey, J.*, plaintiff appeals.

Reversed.

L. Combs and L. S. B. Ritchie, for appellant.

This was not sufficient and continuous user by the public to denote an intention to accept, or to make the road a public highway, in any sense. *Walcott Twp. v. Skaug*, 6 N. D. 382, 71 N. W. 544.

There is no evidence here to show that the land involved belonged to the government at the time of the passage of the act. § 2477, U. S. Rev. Stat. Comp. Stat. 1913, § 4919. The burden is upon defendants to show that title was in the government then, and that acceptance of the grant was by competent authority. *Wells v. Pennington County*, 2 S. D. 1, 39 Am. St. Rep. 758, 48 N. W. 305; *Schwerdtle v. Placer County*, 108 Cal. 589, 41 Pac. 448; *Rolling v. Emrich*, 122 Wis. 134, 99 N. W. 464; *Walbridge v. Russell County*, 74 Kan. 341, 86 Pac. 473.

There must have been a survey, staking out, or actual use by the public of one distinct line of road without abandonment, to entitle defendants to claim a highway, and the burden is upon defendants to show that the public so used one distinct line or specific way as a highway. *Red River & L. of W. R. Co. v. Sture*, 32 Minn. 95, 20 N. W. 229; *Wayne v. Caldwell*, 1 S. D. 483, 36 Am. St. Rep. 750, 47 N. W. 547; *Smith v. Nofsinger*, 86 Neb. 834, 126 N. W. 659.

The evidence here shows absolute abandonment of this tract or line as a highway by the public. *Randall v. Rovelstad*, 105 Wis. 410, 81 N. W. 819; *Meek v. Meade County*, 12 S. D. 162, 80 N. W. 182.

The proceedings in laying out and dedicating a public highway must be a matter of public record, so that all may know of the same, and that the public rights may be clearly defined. *Wayne v. Caldwell*, 1 S. D. 483, 36 Am. St. Rep. 750, 47 N. W. 547; *Woodworth v. Spirit Mound Twp.* 10 S. D. 504, 74 N. W. 443.

The public cannot, by miscellaneous use of different trails over an individual's land for a period of time, in that manner lay out and dedicate a highway, especially where such land is wild or unimproved, as was done in this case. *Smith v. Nofsinger*, *supra*; *Kendall-Smith Co. v. Lancaster County*, 84 Neb. 654, 121 N. W. 960; *Burleigh County v. Rhud*, 23 N. D. 362, 136 N. W. 1082.

In the laying out of highways the proceedings of the commissioners must strictly conform to the instructions and provisions of the statute. A failure to comply therewith will oust them of jurisdiction, and their

proceedings will be null and void. *Highway Comrs. v. Harper*, 38 Ill. 103; *Highway Comrs. v. People*, 4 Ill. App. 391; *Hyslop v. Finch*, 99 Ill. 171; *Wabaunsee County v. Muhlenbacker*, 18 Kan. 129; *People ex rel. Chubb v. Scio Twp.* 3 Mich. 121; *Kenn v. Fairview Twp.* 8 S. D. 617, 67 N. W. 1151.

Benjamin Tufte, for respondents.

"The right of way for construction of highways over public lands not reserved for public use is hereby granted." U. S. Rev. Stat. § 2477, Comp. Stat. 1913, § 4919; *Wells v. Pennington County*, 2 S. D. 1, 39 Am. St. Rep. 758, 48 N. W. 305.

Withholding lands for school purposes is not a grant or reservation for a public use, within the meaning of the congressional grant. *Riverside Twp. v. Newton*, 11 S. D. 120, 75 N. W. 899.

Where the land is made use of by the public and thus capable of identification, it is sufficient. *Elliott, Roads & Streets*, p. 164.

"Where the local government or state makes a plat and thus opens the way to the public, there need be no evidence of acceptance, for that is necessarily involved in the act of dedicating the way." *Reilly v. Racine*, 51 Wis. 528, 8 N. W. 417.

Unmistakable evidence of appropriation is evidence of acceptance. *Comfort v. Great Northern R. Co.* 18 N. D. 570, 120 N. W. 875.

That this highway was once established there can be no question.

"Highways once established over public domain, the public at once become vested with an absolute right to the use thereof which could not be revoked by the government or by others thereafter taking title from the government, because they took it burdened with the highway so established." *Walcott Twp. v. Skauge*, 6 N. D. 382, 71 N. W. 544; *Rolling v. Emerich*, 122 Wis. 134, 99 N. W. 464.

"Where a dedication is shown, all that is necessary to constitute an acceptance of the dedication is that the highway be identified, located, appropriated." *Comfort v. Great Northern R. Co.* supra; *Jamestown & N. R. Co. v. Jones*, 7 N. D. 619, 76 N. W. 227.

Acceptance in such cases by some officer or body is not necessary. *Carpenter v. Schnerle*, 91 Neb. 806, 137 N. W. 850; *Elliott, Roads & Streets*, pp. 175, 176; 2 Dill. Mun. Corp. § 638; *Watertown v. Troeh*, 25 S. D. 21, 125 N. W. 501; *Eastland v. Fogo*, 66 Wis. 133, 27 N. W. 159, 28 N. W. 143; 9 Am. & Eng. Enc. Law, p. 52; *Ashland v. Chicago & N. W. R. Co.* 105 Wis. 398, 80 N. W. 1101.

Deviation from such highway, caused by obstructions placed thereon or across it, does not constitute abandonment, and fencing a public highway for ten years does not prevent the public from claiming it as a highway. *Ford v. Doolittle*, 157 Iowa, 210, 138 N. W. 397; *Lowe v. East Sioux Falls Quarry Co.* 25 S. D. 393, 126 N. W. 609.

It is only where another highway is accepted in place of a pre-existing one, under such circumstances as to give a valid title to the new way, and to work an abandonment of the old highway, is the title of the public to such old highway lost. *Ashland v. Chicago & N. W. R. Co.* 105 Wis. 398, 80 N. W. 1101.

CHRISTIANSON, J. The only ultimate question presented for our determination in this case is whether there exists a highway across a quarter section of land in Griggs county, possessed by plaintiff under a contract of purchase from the board of university and school lands of the state of North Dakota. The plaintiff asserts that no such highway exists, and brought this action to enjoin the township officials from grading and otherwise exercising dominion over the strip of land which defendants claim is dedicated to such highway use. The trial court decided in favor of defendants and dismissed plaintiff's action, and also adjudged that a legal public highway existed across said land. Plaintiff has appealed from this judgment and demanded a trial *de novo* in this court.

Unfortunately litigation of this character is ordinarily accompanied by bitter personal feelings on the part of the litigants and the different members of the community interested in the outcome of the litigation, and usually the evidence presents a hopeless conflict. In this case, however, there is little or no conflict in the evidence regarding the material facts, and the testimony of all the witnesses impresses us with its apparent truthfulness. In the instances wherein differences occur in the testimony of the various witnesses, such variation seems to be due to the difference in observation and recollection of the witnesses, rather than to any desire or intention to testify falsely.

The land involved herein, to wit, the S.W. $\frac{1}{4}$, sec. 36, T. 148, R. 59, was formerly school land, which was granted to the state of North Dakota by Congress in the enabling act (enacted in 1889) for the support of the common schools in the state. The plaintiff purchased this quar-

ter section of land from the state at a public sale held on December 13, 1909, and since that time he has possessed, and exercised dominion over, said tract.

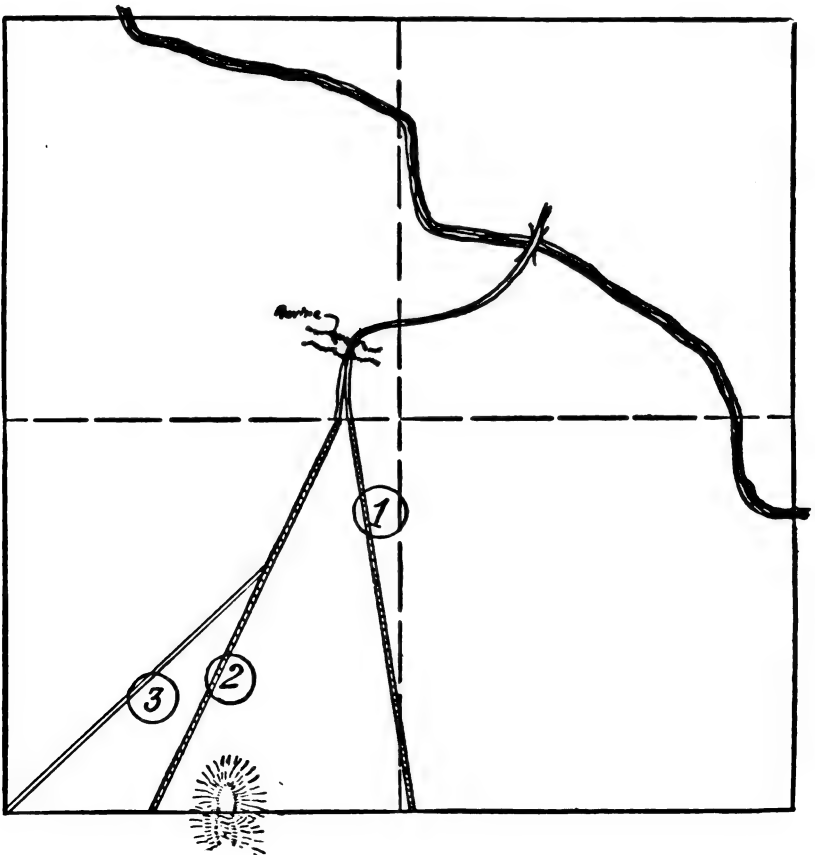
The evidence shows that in 1883 the public began to use and travel a trail over the land in question. This trail led to Cooperstown, and entered the tract in controversy on the north boundary line thereof at a point some rods west of the east quarter line, running thence in a southeasterly direction, intersecting the east quarter line of such tract a short distance north of the southeast corner thereof. This trail was designated upon the trial as trail No. 1. This trail was traveled for about six years, when a man named Cameron became possessed of the quarter lying immediately south of the tract in controversy. Cameron broke up that portion of his land crossed by trail No. 1, and this trail was used no more. Thereupon, as is usual in such cases, the public began to use another trail. This trail was designated upon the trial as trail No. 2. This trail entered the tract in controversy at the north boundary line at or about the same place as trail No. 1, or some distance west thereof. Trail No. 2, however, ran in a southwesterly direction and emerged from, and intersected the south boundary line of, the tract in controversy at a distance about 80 rods west of the point where trail No. 1 intersected the same line. Trail No. 2 was traveled by the public for about two years when Cameron constructed a house on his land lying south of the tract in controversy whereupon he stopped travel upon his land over trail No. 1, and the public thereupon ceased to travel upon this trail and began to use a third trail known upon the trial as trail No. 3. Trail No. 3 branched off from trail No. 2 at some distance south of the north boundary line of the tract in controversy. (The evidence does not disclose the exact distance, but it is apparently about 25 or 30 rods south of the north boundary line.) Trail No. 3, however, emerged from the tract in controversy at the southwest corner thereof or about 80 rods west of the point where trail No. 2 emerged from such tract. Trail No. 3 was traveled for a period of about two years when obstructions were placed in its way by Cameron along the north line of his land, and the public again began to use trail No. 2, which was used for about six years or until the spring or summer of 1900.

One Elof Olson became the owner of the Cameron quarter in June, 1897, and in 1900 he broke up, and subsequently fenced, that part of

the quarter which was crossed by trail No. 2. Thereupon travel over trail No. 2 across the Cameron land as well as across the land in controversy was wholly or practically abandoned, and the public again used trail No. 3, and continued to use the same for about ten years thereafter, or up to some time in July, 1910, when plaintiff broke that part of the quarter in controversy crossed by trail No. 3. Train No. 3 was thereupon abandoned, and the public again began to travel over trail No. 2, which continued to be traveled until this action was brought in July, 1913.

Upon the trial the plaintiff offered in evidence the following plat showing the approximate location of the three trails:

Sec. 36 T. 148 N. R. 59 W.



The witnesses are practically all agreed that the general location, direction, and points of egress of the trails are correctly shown on the plat, but they differ as to whether the plat correctly shows the point where trail No. 2 enters the tract at the northern boundary line. With respect to this, plaintiff's witnesses claim that the plat is correct, while defendant's witnesses claim that trail No. 2 entered upon the premises at the same (or practically the same) point as that where trail No. 1 entered the same.

The laws of the territory of Dakota applicable to the opening and laying out of highways in force in 1884 provided as follows: "Whenever twelve freeholders of the county, six of whom shall reside in the immediate neighborhood, shall petition the board of county commissioners for the location, vacation, or change of any public highway, other than on section or quarter section lines, such board, if they shall be satisfied that notice of such application has been given by publication three weeks successively in a newspaper published in the county, or by posting up notices in three of the most public places in the neighborhood of such highway, or change, at least twenty days before the meeting of the board at which such petition is to be presented, shall appoint three persons to view such highway." Pol. Code, Rev. Codes 1877, § 18, chap. 29.

"The board of county commissioners has power to establish, change, and vacate highways upon section and quarter section lines, when the initial and terminal points, and the course of the highway, can be clearly described without the appointment of viewers or the services of a surveyor; but in all other respects the proceedings therein shall be governed by the provisions of the preceding subdivision of this chapter, relating to the establishment, vacation, and change of highways not on such lines." Pol. Code, Rev. Codes 1877, § 30, chap. 29.

"All public highways which have been or may hereafter be used as such, for twenty years or more, shall be deemed public highways." Pol. Code, Rev. Codes 1877, § 37, chap. 29.

"All public roads and highways within this territory which have been open and used as such, and included in a road district in the town in which the same are respectively situated during twenty years next preceding the time when this act shall take effect, are hereby declared public roads or highways and confirmed and established as such, whether the same have been lawfully laid out, established, and opened or

not." Laws 1883, § 1, chap. 2, chap. 112. See also *Walcott Twp. v. Skauge*, 6 N. D. 382, 389, 71 N. W. 544.

It is conceded that the land in controversy was not within the limits of any organized township, and that the proceedings to establish a highway over the same would necessarily have to be brought before the county commissioners.

Under the laws of the territory of Dakota in force in 1884, public highways might become established in such territory in any one of the following ways:

1. Section lines, whether traveled or not, were already highways by virtue of legislative declaration, and might be traveled and subjected to such use as far as practicable. Pol. Code 1877, § 1, chap. 29.

2. Roads, other than on section or quarter lines, could be established by the board of county commissioners, upon a petition signed by twelve freeholders of the county, six of whom resided in the immediate neighborhood of the proposed road.

3. Roads might be created by user for a period of twenty years.

It is undisputed that the proceedings prescribed by § 18, chap. 29, Pol. Code 1877, were not had. It is undisputed that no petition was ever filed with, or presented to, the county commissioners, asking for the location of the highway in controversy, and that no notice of the presentation of a petition or application was ever published or posted. The undisputed evidence shows that the county and township road officers never exercised or attempted to exercise any control over any part of the road so surveyed by Ulland and acted upon by the county commissioners of Griggs county, but that the whole of the proposed highway was, with the single exception of the trail leading over the land in controversy, abandoned. That about 1891 Cameron obstructed and stopped travel upon such alleged highway across the premises lying immediately south of the land in controversy, and thereby stopped travel thereover for a period of about two years. And that in 1900, Olson, the then owner, broke and subsequently fenced the land lying immediately south of the tract in controversy, and thereby stopped travel over such proposed highway across the so-called Cameron land, and that the proposed highway as surveyed across such land has never since been traveled. And upon the trial of this action the township officers disclaimed any intent of claiming a highway across the Cameron land.

The undisputed testimony further shows that no work or repair of any kind was ever performed upon such alleged road at any time or at any place on the land in controversy.

It is conceded by respondent that the decision of this court in *Burleigh County v. Rhud*, 23 N. D. 362, 136 N. W. 1082, is decisive of the fact that the public user of the trails over the land in controversy did not create a highway by prescription. But respondent's counsel claims, and the trial court found, that Congress granted a highway over said premises, and that the county commissioners of Griggs county accepted such grant and thereby created such highway. Respondents rest this claim upon certain evidence showing that one Ulland, the county surveyor of Griggs county, in the spring of 1884 at the request of the county clerk or one of the county commissioners of Griggs county, made a proposed survey of a proposed road commencing at or near the northeast corner of section 1, T. 148, R. 59, running thence a distance of some 15 to 20 miles and terminating at or near Coopers-town; that the proposed road shown in this survey ran across the quarter section in controversy in approximately the same place occupied by trail No. 2; and that the records of the county clerk of Griggs county show that on April 11, 1884, the county commissioners of that county appointed three viewers to view such proposed highway; that on May 19, 1884, the report of the viewers was accepted and three reviewers of such proposed road selected by the county commissioners, and that the report of such reviewers was "received and on motion, opened."

The grant upon which respondents rely is the following law enacted by Congress in 1866: "The right of way for construction of highways over public lands not reserved for public use is hereby granted." U. S. Rev. Stat. § 2477, Comp. Stat. 1913, § 4919. The Federal grant was accepted by the legislative assembly of the territory of Dakota in 1871, by an enactment which provided "that all section lines in this territory shall be and are hereby declared public highways as far as practicable." Laws 1871, chap. 33. That provision has remained in force in the territory and state since its enactment. See *Wenberg v. Gibbs Twp.* 31 N. D. 46, 153 N. W. 440.

The establishment of a system of highways is not altogether a matter of local concern or interest, but is a matter which concerns and affects

in a measure the state as a whole. The legislature in its acceptance of the congressional grant recognized this fact, and as a matter of governmental policy established a system of highways to be constructed as far as practicable along the various section lines. In construing the statutory provisions enacted by the territorial legislature, in the case of *Lawrence v. Ewert*, 21 S. D. 580, 114 N. W. 709, the supreme court of our sister state said: "It will be observed that by the act of 1871 the lawmaking power has clearly expressed its intention in language susceptible of but one construction. The expression, 'all section lines shall be and are hereby declared public highways as far as practicable,' was evidently intended to make every section line in the then territory and now state a highway over which the people of the state would have an easement and right of way subject to the qualifications therein contained for the purpose of passing from one section of the state to another. Declaring section lines 'public highways' means that they are roads which every citizen has a right to use. . . . The legislature evidently intended that the term 'highway' as used in the law of 1871 should have the ordinary meaning, and that section lines throughout the territory as far as practicable, and not interfering with the then existing highways in the settled portions of the territory, should be open to the use of the public, and no action of boards of county commissioners or supervisors of townships is required to establish or open such highways as are practicable on section lines. The highways so established by the legislative authorities cannot lawfully be instructed by private citizens until changed or vacated in the manner provided by law. . . ."

"Appellants attach much importance to the clause, 'as far as practicable;' but it is quite evident that the only purpose of that qualification was to relieve the counties from the expenditure of money in the opening of highways not practicable without such expenditure, and do not limit or qualify the general language of the section, providing that 'all section lines shall be and are hereby declared public highways,' as applicable to section lines which could be used as such highways without any additional expenditure of money or labor thereon."

In discussing the effect of the congressional grant and what is essential to constitute a sufficient acceptance thereof, the supreme court of Washington in *Vogler v. Anderson*, 46 Wash. 202, 9 L.R.A.(N.S.)

1223, 123 Am. St. Rep. 932, 89 Pac. 557, said: "The grant is for a right of way to establish a public highway, and a public highway must be established in some of the ways provided by statute before the grant takes effect. If the road is established under the statute providing for their establishment by the board of county commissioners, it takes effect when the commissioners lawfully establish the road; but, if the road is established by adverse user, it takes effect when the adverse user ripens into a right by prescription."

We are not called upon in this case, however, to determine whether the language used by the Washington court should be literally adopted as the rule in this state. But in so far as it holds that "if the road is established by adverse user, it takes effect when the adverse user ripens into a right by prescription," it is in harmony with the law announced by this court in *Burleigh County v. Rhud*, 23 N. D. 362, 136 N. W. 1082. As already stated, it is conceded that, in the case at bar, the adverse user had not ripened into, or resulted in the establishment of, a highway by prescription. The authorities seem agreed that there can be no acceptance of the congressional grant by public user alone, unless such user continues for a length of time sufficient to ripen into a right by prescription as defined by the laws of the state or territory where such highway is located. The authorities, also, seem agreed that in all other cases acceptance of the Federal grant must be by some positive act on the part of the public authorities authorized to establish and maintain highways, showing a clear intent on the part of such authorities as agents for the public to accept the grant. See *Vogler v. Anderson*, *supra*; *Smith v. Nofsinger*, 86 Neb. 834, 126 N. W. 659; *Wallowa County v. Wade*, 43 Or. 253, 72 Pac. 793, and authorities cited in these cases. See also *Keen v. Fairview Twp.* 8 S. D. 558, 67 N. W. 623; *Wayne v. Caldwell*, 1 S. D. 483, 36 Am. St. Rep. 750, 47 N. W. 547; *Meek v. Meade County*, 12 S. D. 162, 80 N. W. 182; *Shanline v. Wiltsie*, 70 Kan. 177, 78 Pac. 436, 3 Ann. Cas. 140; *Smith v. Smythe*, 197 N. Y. 457, 35 L.R.A.(N.S.) 524, 90 N. E. 1121; *Randall v. Rovelstad*, 105 Wis. 410, 81 N. W. 819.

In this case we are convinced that no such acceptance has been shown. The mere fact that the county surveyor made a proposed survey of a proposed highway, and that subsequently the county commissioners appointed viewers and reviewers of such highway, and accepted their

reports, when taken in connection with the undisputed facts that shortly thereafter the authorities permitted Cameron and other owners of land crossed by the alleged highway to obstruct the same; that such obstructions resulted in a repeated change to widely divergent routes of travel over the land in controversy; that the public officers never exercised or sought to exercise dominion or control over the alleged highway, even across the land in controversy, and never caused any labor to be performed either in the construction or repair thereof, although labor was performed on the highway on the township line adjacent thereto; that the entire proposed highway as surveyed by Ulland, some 15 miles and over in length (with the single exception of the routes traveled over the land in controversy), has long since been wholly abandoned, in our opinion, fails to show any acceptance of a right of way for, or the establishment of, a highway over the land in controversy. If the public authorities believed that they had established the proposed highway surveyed by Ulland, it is difficult to understand how Cameron and others could be permitted with impunity to intentionally obstruct the same and prevent all travel thereover.

We have reached the conclusion that a highway was not established over the land in controversy. The judgment is therefore reversed and the cause remanded with directions that judgment be entered in conformity with the views expressed in this opinion.

STATE OF NORTH DAKOTA v. C. H. STEVENS.

(157 N. W. 668.)

Criminal information — public decency — openly outraging — charge of — public morals — demurrer — facts insufficient.

1. To a criminal information attempting to charge facts sufficient to constitute the crime of openly outraging public decency and injuring public morals, under § 10250, Comp. Laws 1913, a demurrer was interposed and overruled. After conviction, defendant appeals. *Held*: The demurrer should have been sustained, as the facts stated in the information are insufficient to constitute the crime attempted to be charged.

Statute—prosecution under—other crime—Penal Code.

2. Prosecution under said statute must be for acts constituting no other crime defined by the Penal Code.

Words—"openly" used in statute—public decency—crime—commission of.

3. The word "openly" as used in said statute, requiring that to be prosecuted thereunder the acts must "openly outrage public decency," is a part of the statutory definition, and to constitute said crime the act must be openly done, instead of secretly with the public excluded from observing it.

Opinion filed March 30, 1916.

From a judgment of the District Court of Traill County, *Pollock, J.*
Defendant appeals.

Reversed.

John Carmody and *C. E. Leslie*, for appellant.

The statute defines no crime, nor has the legislature created thereby any crime; the statute is void because it delegates legislative powers to the court or to the jury.

It is well settled that the functions of government must be kept separate, and the delegation by the legislature of its powers to other departments of government has always been held unconstitutional. *Glaspell v. Jamestown*, 11 N. D. 86, 88 N. W. 1023; *State ex rel. Rusk v. Budge*, 14 N. D. 532, 105 N. W. 724; *State ex rel. Standard Oil Co. v. Blaisdell*, 22 N. D. 86, 132 N. W. 769, Ann. Cas. 1913E, 1089; *McCrowell v. Bristol*, 89 Va. 652, 20 L.R.A. 653, 16 S. E. 867; *State ex rel. Miller v. Taylor*, 27 N. D. 77, 145 N. W. 425.

The statute is void for uncertainty. A statute or other law that does not definitely state what acts are prohibited is void for uncertainty. *Kreulhaus v. Birmingham*, 164 Ala. 623, 26 L.R.A.(N.S.) 492, 51 So. 297; *Czarra v. Medical Supers.* 25 App. D. C. 443; *Johnson v. State*, 4 Tex. App. 63.

The statute is in effect an *ex post facto* law of dangerous type, since it is also so indefinite and elastic, and because it leaves to the same body—the court and jury—the power to create the crime. *Johnson v. State*, supra; 8 Cyc. 1027, and cases cited; *Ex parte Jackson*, 45 Ark. 158.

But, if the statute is upheld, the conviction of the defendant must still be set aside and the judgment reversed, for the evidence does not

prove acts for which he can be convicted under the information. The acts must be done openly, and not in secret, or where the public is excluded. Comp. Laws 1913, § 10250.

Chas. A. Lyche, State's Attorney, for respondent.

There is no delegation of legislative powers to the courts, or to juries, in the statute in question.

The test is whether the language may apply not only to a particular act about which there can be little or no doubt or difference of opinion, but equally to others about which there may be radical differences. *Czarra v. Medical Supers.* 25 App. D. C. 443.

The law presupposes and presumes a uniform standard of morality and decency throughout our state. The act, in order to constitute a violation of the statute, must be "wilful." The word "wilful" means "with a bad purpose." *Potter v. United States*, 155 U. S. 438, 39 L. ed. 214, 15 Sup. Ct. Rep. 144; *Com. v. Kneeland*, 20 Pick. 206; *Williams v. People*, 26 Colo. 272, 57 Pac. 701; *State v. Alcorn*, 78 Tex. 387, 14 S. W. 663; *Parsons v. Smilie*, 97 Cal. 655, 32 Pac. 702; *Richardson v. State*, 5 Tex. App. 472; *United States v. Three Railroad Cars*, 1 Abb. (U. S.) 196, Fed. Cas. No. 16,513; *Black's Law Dict.* 1242; *King v. State*, 103 Ga. 263, 30 S. E. 30; *Huff v. Chicago, I. & L. R. Co.* 24 Ind. App. 492, 79 Am. St. Rep. 274, 59 N. E. 932; *Dull v. Cleveland, C. C. & St. L. R. Co.* 21 Ind. App. 571, 52 N. E. 1013; *Miller v. Miller*, 17 Ind. App. 605, 47 N. E. 338, 3 Am. Neg. Rep. 372.

The word "wilful" when used in a penal statute to characterize the forbidden act means evil intent or legal malice, or "without reasonable grounds to believe the act to be lawful." *Trice v. State*, 17 Tex. App. 43; *Rose v. State*, 19 Tex. App. 470; *Shubert v. State*, 16 Tex. App. 645; *Thomas v. State*, 14 Tex. App. 200; *Lane v. State*, 16 Tex. App. 172; *Savage v. Tullar, Brayton (Vt.)* 223; *State v. Clark*, 29 N. J. L. 98; *State v. Preston*, 34 Wis. 675; *King v. State*, 103 Ga. 263, 30 S. E. 30; *Cornelison v. State*, 40 Tex. Crim. Rep. 159, 49 S. W. 384; *High v. State*, 26 Tex. App. 545, 8 Am. St. Rep. 488, 10 S. W. 238; *Mills v. Glennon*, 2 Idaho, 105, 6 Pac. 116; *Bowers v. State*, 24 Tex. App. 542, 5 Am. St. Rep. 901, 7 S. W. 247; *Ferguson v. State*, 36 Tex. Crim. Rep. 60, 35 S. W. 369.

The word "wrongful" means "contrary to justice and fairness."

Websters New Int. Dict.; New National Dict. Enc.; Riddell v. Peck-Williamson Heating & Ventilating Co. 27 Mont. 44, 69 Pac. 241; O'Connor v. Dils, 43 W. Va. 54, 26 S. E. 354; People v. Quanstrom, 93 Mich. 254, 17 L.R.A. 723, 53 N. W. 165; Cullinan v. Burkhard, 41 Misc. 321, 84 N. Y. Supp. 825; McDonald v. Brown, 23 R. I. 546, 58 L.R.A. 768, 91 Am. St. Rep. 659, 51 Atl. 213; Re Long, 39 N. Y. S. R. 892, 15 N. Y. Supp. 657.

"Openly outrages," means to do an act in the open; plainly, publicly, obviously, and in a violent, furious, atrocious, heinous, abusive manner. Webster's New Int. Dict.; Mosnat v. Snyder, 105 Iowa, 500, 75 N. W. 356.

"Public decency" are words with a meaning so well understood and legally defined that there can be no question about them when found in a statute. Webster's New Int. Dict.; Comp. Laws 1913, § 9742; People v. Most, 36 Misc. 139, 73 N. Y. Supp. 220; Penal Code, § 675.

It is true that the legislative powers must not be delegated to other branches or departments of government. But, as to the statute in question, appellant's contention has no merit. It is wholly unlike any of the statutes or ordinances mentioned in the cases cited by appellant. Glaspell v. Jamestown, 11 N. D. 86, 88 N. W. 1023; State ex rel. Rusk v. Budge, 14 N. D. 532, 105 N. W. 724; State ex rel. Miller v. Taylor, 27 N. D. 77, 145 N. W. 425; McCrowell v. Bristol, 89 Va. 652, 20 L.R.A. 653, 16 S. E. 867; Chrisman v. Jackson, 84 Miss. 787, 37 So. 1015; Oakland v. Miller, 90 Miss. 275, 43 So. 467.

Assignments of error and exceptions will be deemed waived and abandoned unless presented to the court by brief and argument. Ashley v. Sioux City, — Iowa, —, 93 N. W. 303; Little Dorrit Gold Min. Co. v. Arapahoe Gold Min. Co. 30 Colo. 431, 71 Pac. 389; Schmidt v. Beiseker, 19 N. D. 35, 120 N. W. 1096; Pendroy v. Great Northern R. Co. 17 N. D. 433, 117 N. W. 531; Old Rule, XIV, 10 N. D. XLVI, 91 N. W. VIII; New Rule, No. 34, Rules of Sup. Ct.

Goss, J. A demurrer was overruled interposed to the following criminal information, omitting formal heading, viz.:

"Heretofore, to wit: On the 18th day of July, 1915, at the county of Traill in said state of North Dakota, one C. H. Stevens did commit the crime of wilfully and unlawfully committing an act which openly

outraged public decency and was injurious to public morals, committed as follows, to wit:

"That at said time and place the said defendant, C. H. Stevens, did wilfully and unlawfully entice and procure one Florence Stenmo, then and there a married woman the wife of one Martin Stenmo, and with him then and there living as husband and wife, to go with him, the said defendant, into a certain so-called Pool Hall, situated upon lot 22 in block 30, of the original townsite of Hatton, Traill county, North Dakota, as per the official plat thereof on file and of record in the office of the register of deeds of said county, at or about the hour of 4 o'clock in the afternoon of said day, which was Sunday, and on which day said Pool Hall was closed to the public, by virtue of the law in such case made and provided, and there remained with her alone until after the hour of 11 o'clock in the afternoon of said day, he the said defendant being then and there himself a married man, and so remained with said Florence Stenmo behind locked and barred doors and blinded windows, in the presence of a large crowd of people until said hour, thus openly outraging public decency and injuring public morals;

"This contrary to the form of the statute in such cases made and provided, and against the peace and dignity of the state of North Dakota.

"Dated at Hillsboro, North Dakota, this 28th day of July, A. D. 1915."

The question presented on the demurrer is whether the facts stated constitute the crime charged. The demurrer should have been sustained. Whether the information charges a crime under the statute depends not upon acts charged, but upon inferences not charged but possible to be drawn from certain facts stated. It is entirely possible for said facts stated to have occurred and yet defendant be not guilty of the crime inferred by the jury. The facts charged are that a married man and a married woman, not husband and wife, remained within said closed building with blinded windows from 4 until 11 o'clock that Sunday afternoon. This statement lacks as much of certainty in charging the commission of this crime as it would in thus attempting to charge instead the commission of the crime of adultery, or of the crime of unlawful cohabitation, or of fornication or of sodomy, or of

maintaining a house of prostitution, or possibly any other sexual crime. Unaided by uncertain inference, no crime is charged. That the kind of inferences to be drawn could make the acts charged so supplemented, any one of several crimes according to the uncertain inference is in itself sufficient to condemn as vulnerable to demurrer the information which constitutes a shotgun charge at some one of several crimes possibly charged according to the inferences used to supplement the few facts actually alleged. Defendant could have stated that he committed all the acts charged and yet plead not guilty, a condition rather anomalous in criminal pleading and procedure as would forcefully appear had the charge been larceny, and had the defendant admitted every fact charged in the information but still pleaded not guilty. And an examination of the proof discloses that this defendant was convicted accordingly, not upon what was charged in the information to have occurred, but instead upon facts or inferences of fact not therein charged but which the jury inferred, and the court likewise must have assumed happened as either the result of or the reason for these two persons remaining behind closed doors during that time. The court evidently realized that there was something necessary to convict this defendant besides mere proof of the facts charged in the information; otherwise the following instruction would not have been given: "There is foreshadowed in that charge (after reading the information) a clear violation of sex relation such as ought not to exist between a man married and a woman married. Referring to this charge particularly, it does not necessarily charge that adultery was committed, but it does charge an improper sex relation, and that is the question for you to answer when you go to your jury room,—Did the defendant take this woman there for that purpose? He has gone upon the witness stand and given you an explanation of why he was there. His explanation is that which would be consistent with an honest purpose, and if you believe that his explanation is sufficient" defendant should be acquitted, but if "the state has shown you by evidence beyond a reasonable doubt that his purpose was an unlawful purpose, and if you believe by evidence beyond a reasonable doubt that the purpose was a wrong purpose, then he would be guilty as charged." "Ever since the statutes of the state of North Dakota has declared for the purity of the home, not going back any further, relations of the kind charged here are not

proper, and are calculated to injure public morals, and if such you find the fact to be in this case, you should find the defendant guilty if the evidence mounts up to that high position to which I have called your attention. Upon the other hand, if this explanation you believe puts him within the category of doing what he did there honestly, and not for the purpose of doing wrong, then, even though it may have caused a crowd, you should find him not guilty."

The trouble is with the information. It does not charge acts or inferences or intent, upon which any part of this instruction could be based. Yet without a finding of fact, inference, or intent as declared necessary in the instructions, no crime is found to have been committed, but instead that would be left to conjecture as to whether any one of several was actually the one committed, or if any crime was committed. Defendant is prosecuted under § 10250, Comp. Laws 1913. It reads: "Every person who wilfully and wrongfully commits any act which grossly injures the person or property of another or which grossly disturbs the public peace or health or which openly outrages public decency and is injurious to public morals, although no punishment is expressly prescribed therefor by this Code, is guilty of a misdemeanor." The defendant is prosecuted for a nondescript crime, that of openly outraging public decency and injuring public morals. The statute is intended to cover acts not specifically criminal by other provisions of the Code. The service of a stallion upon the public streets would be an example as within the plain purview of the statute. But in a prosecution therefor the acts constituting the crime must be charged, and those acts as charged must answer to the statutory definition, so that proof of the acts establish the commission of a crime. It is entirely possible for the state to prove every act specified in this information and yet there be no sex relation involved. Another crime entirely might have been committed; as kidnapping for instance. Even assuming that in the words of the instruction that in the information "there is foreshadowed a clear violation of sex relation such as ought not to exist between a man married and a woman married" that inference is that another crime, that of adultery, was committed. And the proof offered in this case would be sufficient to sustain a conviction for adultery, as the jury must have found under the instruction, that this information "foreshadowed a clear violation of sex relation;" that these

persons resorted to this place for adulterous intercourse and of course availed of the ample opportunity of accomplishing that for which they consorted for hours. Had defendant been prosecuted for that crime, instead of upon an information attempting to charge a different crime but not charging any crime except by possible inferences, the act of sex violation would have been specifically charged. There would have been no necessity of inference as to what was charged. And had this information defined the facts as broadly as the inferences given the jury and which they found, the information would probably have been duplicitous as charging adultery as well as the one attempted to be charged.

Again § 10693, Comp. Laws 1913, requires that "the act or omission charged as the offense" be "clearly and distinctly set forth in ordinary and concise language without repetition and in such a manner as to enable a person of common understanding to know what is intended." What acts are this defendant charged with? The answer is being alone with a married woman, not his wife, from 4 until 11 o'clock in the afternoon of a certain day in a building closed to the public, with locked and barred doors and blinded windows. Nowhere in the information is there any charge of sex violation. That remains wholly to inference and conjecture, and so remained until the information was supplemented by the charge of the court that nevertheless a sex violation was inferentially hidden therein. It is highly probable from the proof that there was a sex violation by these parties that day. But if so, another crime was committed than the one for which this defendant was prosecuted. And if the defendant is tried for a sex violation, most certainly he should be charged with it in the information itself. Otherwise, he is as here, charged with one act and tried for and convicted of additional acts. That the trial court was obliged by its instructions to thus supplement the charge contained in the information is sufficient proof that those facts set forth in the information do not constitute in themselves a crime. Had the jury by a special verdict found every fact charged in the information to have been committed by the defendant, no judgment could be pronounced thereon without supplementing them with the inference with which the court in its instruction supplemented the information. In other words, he is not tried for only being and remaining there, but in the

language of the court's instructions, also for "what he did there," as conclusively appears from the following instruction: "Upon the other hand, if this explanation you believe puts him within the category of doing what he did there honestly, and not for any purpose of doing wrong, then even though it may have caused a crowd you should find him not guilty." Plainly the gist of the crime as found by the jury was not only the charge laid in the information, but something not therein charged, viz., "what he did there" behind locked doors.

Then, too, the information is fatally defective from another standpoint under the authority of *Gunn v. Territory*, 19 Okla. 240, 91 Pac. 861. The defendant did not openly outrage public decency within the meaning in which the words are used in the statute. Oklahoma has our identical statute, word for word. A physician was prosecuted under this statute for what he attempted with his office girl in his office, and the following from that decision has application here:

"Does the indictment charge a public offense? The indictment charges the defendant with openly outraging public decency and committing an act injurious to public morals. The facts pleaded in the indictment do not sustain the charge. If the defendant did the acts charged, he outraged decency and committed an act injurious to morals; but he did not openly outrage public decency and commit an act injurious to public morals. The statute is directed against acts which are committed openly and affect the public. As to whether an act is committed openly is generally a mixed question of law and fact, but it cannot be seriously contended that a doctor's private office is such a place as to give an act committed therein the character of an open act, especially when no one was present except the one against whom the act was committed. . . . By referring to cases which discuss the meaning of the words 'openly' and 'public,' as, for instance, 'open adultery', 'public nuisance' and 'public morals,' etc., one will see that the acts charged against the defendant do not fall within the purview of the statute." And what was there true was equally apparent here. It is difficult to understand how the defendant wilfully openly outraged public decency by sneaking behind closed doors and blinded windows, and there secretly perpetrating the crime that the jury have inferred he committed, *i. e.*, adultery, and have it constitute the crime charged in the information, simply because outsiders observing the two

enter the closed building gathered a mob, and guarded the building and occupants secreted therein from public view, throughout the afternoon and evening. Certainly defendant and his paramour did not intend their acts done in secret should thus attract the rabble. That was the farthest from their intention, accepting at face the inference that they went there for adulterous purposes. Nor is it possible that this could be done openly "in the presence of a large crowd of people" and occur "behind locked and barred doors and blinded windows" as charged in the information.

The defendant has in effect been tried for and convicted of adultery without being charged with it. Under the court's instructions, presumably followed, it was necessary that the jury find defendant and this woman sustained "an improper sex relation;" and while the instructions told the jury that it was not necessary to convict that adultery was committed, yet the jury must find an improper sex relation existed or acquit. It is difficult to understand what the trial court meant other than that the fact of adultery was necessary to be found upon which to base a verdict of guilty, and this, too, in addition to the acts charged in the information. And the same proof was introduced as would have been admissible in a prosecution for adultery on the same record, as, for instance, it was practically established that this man and woman had prior to this time been upstairs together in bed in an adjoining building. This, supposedly for the purpose of showing their adulterous disposition. If, as held in the Oklahoma case under an identical statute, this prosecution is possible only where the acts committed do not constitute a crime otherwise known to the Penal Code, the proof of the commission of adultery establishes that the crime was one other than that charged in the information, and that the prosecution should have been for adultery instead of upon "a blanket statute like the section quoted above." This negatives the right to prosecute for this nondescript crime. It is the theory of the criminal law that any violators thereof shall be prosecuted for the crime they commit and which they know they are committing when doing the acts or permitting the omissions which constitute the crime. While oftentimes the same act may constitute more than one crime, yet such is not applicable under the statute in question, as it is designed to cover only

those acts not otherwise criminal, but which "openly outrage public decency and injure public morals."

No constitutional question raised is necessary to be passed upon, though the statute is assailed in the briefs. The facts contained in the information are insufficient to charge the commission of a crime. And the information on its face shows the acts were not done openly in the sense in which the important modifying term of the statute is used or intended. The demurrer should have been sustained.

If this defendant can be convicted on inferences that are only "foreshadowed" in the information, then a conviction of felony on inferences only thus foreshadowed, and not specifically charged, should be equally proper where the evidence may establish the party guilty of crime, whether of the crime attempted to be charged or a different one. Such would be precedent dangerous to liberty and contrary to constitutional guaranties as well. Every defendant is constitutionally entitled to be informed of what he is to be tried for by a written accusation of facts consisting of his acts or omissions, which must be sufficient in themselves to disclose the commission of a crime. No matter how heinous or revolting the case, nothing less satisfies those requirements of statute imperatively necessary to safeguard the individual and his rights and liberties, can be tolerated or sustained. The invasion of defendant's rights was substantial, not technical. The conviction is ordered set aside.

CHAFFEE BROS. COMPANY, a Corporation, v. POWERS ELEVATOR COMPANY, a Corporation.

(157 N. W. 689.)

Conversion of grain—chattel mortgage—action for—mortgagee—prima facie case—mortgagor—interest in property—subject of mortgage—filing—grain—sold to defendant—identification of grain—lease—tenant.

A plaintiff makes out a prima facie case in an action for the conversion of grain upon which it holds a chattel mortgage, by showing that its mortgage covers the half interest of the mortgagor in grain grown upon a certain tract

of land, that the mortgage was on record, and that all of the grain raised on said land was sold to the elevator company by the tenant and mortgagor, that it was raised on said land by the mortgagor, and that said mortgagor was farming and in possession of the premises, and this without actually introducing in evidence the lease, if any, under which the tenant held.

Opinion filed April 3, 1916.

Action for the conversion of grain.

Appeal from the District Court of Foster County, *Coffey, J.* Judgment for defendant. Plaintiff appeals.

Reversed.

T. F. McCue, for appellant.

The actual evidence, together with the evidence embraced within appellant's offer of proof, which was erroneously disallowed, a prima facie case showing conversion was made. Such showing was in no manner controverted, and it was error for the court to direct a verdict. *Morris v. Minneapolis*, St. P. & S. Ste. M. R. Co. 25 N. D. 136, 141 N. W. 204; *Zink v. Lahart*, 16 N. D. 56, 110 N. W. 931; *Hall v. Northern P. R. Co.* 16 N. D. 60, 111 N. W. 609, 14 Ann. Cas. 960; *Cameron v. Great Northern R. Co.* 8 N. D. 124, 77 N. W. 1016, 5 Am. Neg. Rep. 454; *Rodoni v. Lytle*, 13 Mont. 123, 32 Pac. 491.

To prove ownership, all that need be shown is possession of and dominion over the property. This ownership may be general or special. *Parker v. First Nat. Bank*, 3 N. D. 87, 54 N. W. 313; Rev. Codes 1905, § 6183, Comp. Laws 1913, § 6759.

The proper filing of a chattel mortgage operates as notice thereof to all subsequent purchasers and encumbrancers of the property described in the mortgage. Under the ruling of the trial court, whenever a chattel mortgage is taken from a tenant, on growing crops, the title by which he holds the same would also have to be filed. *Beal v. Blair*, 33 Iowa, 323; 32 Cyc. 393; *Sherin v. Brackett*, 36 Minn. 152, 30 N. W. 551; *Ellestad v. Northwestern Elevator Co.* 6 N. D. 88, 69 N. W. 44.

The mortgagor's possession of property is prima facie evidence of ownership. *Nichols, S. & Co. v. Barnes*, 3 Dak. 148, 14 N. W. 111.

S. E. Ellsworth, for respondent.

Trover cannot be maintained by one who has neither title nor right of possession. Plaintiff must have a property right, general or special,

in the chattel converted, or was in possession thereof; or had the right to immediate possession, and must prove this as a fact. 38 Cyc. 2044.

The evidence utterly fails to establish any such condition, and plaintiff's offer of evidence was clearly objectionable, as hearsay, not the best evidence and incompetent, because it had been disclosed during the trial that a lease existed; that it was there within reach of plaintiff and he failed to use it. *Short v. Northern P. Elevator Co.* 1 N. D. 163, 45 N. W. 706; *Balding v. Andrews*, 12 N. D. 267, 96 N. W. 305, 14 Am. Neg. Rep. 615.

BRUCE, J. This is an action brought by a chattel mortgagee for the conversion of certain grain by the defendant elevator company which was sold to it by one Fred Klemstein. The only question to be decided is whether the plaintiff made out a prima facie case, or, in other words, whether the plaintiff made prima facie proof of a mortgageable interest in the said Fred Klemstein; it being remembered that neither the said Fred Klemstein, the tenant, nor one Cummings, who appears to have been the owner of the land, were made parties to the proceeding. The plaintiff alleges in its complaint that on the 9th day of September, 1912, the said Klemstein gave to it his promissory note and the mortgage upon his undivided one-half interest in the crop to be grown during 1913 upon a certain quarter section of land, and that Klemstein raised on this land about 800 bushels of wheat which, with notice of the plaintiff's mortgage, defendant unlawfully seized and converted to its own use.

The answer denies the allegations of the complaint in all of its particulars.

Upon the trial of the action the only witness called by plaintiff was one Hansch, who was acting as secretary, treasurer, and manager of the plaintiff corporation. He testified that he knew Fred Klemstein, and that Klemstein had executed and delivered to plaintiff the chattel mortgage mentioned and upon the grain described in the complaint. The mortgage then having been introduced in evidence, Hansch testified that he was acquainted with the land described, that during the year 1913 Klemstein farmed the entire section; that in the fall of 1913 the witness knew that Klemstein raised wheat on the southwest quarter of the section; that the said Klemstein was a renter from Cum-

mings, and that he had farmed the land the year before as a tenant of Cummings, and that he knew the number of bushels of wheat that had been delivered to the defendant elevator company, he being present in the defendant's elevator at the time, and that the number was about 840 bushels. It then appears that counsel for plaintiff asked counsel for defendant if he had in his possession a lease between Klemstein and Cummings, and that counsel for defendant stated that neither he nor his client had such an instrument in his possession, but that he had a copy of such a lease. Counsel for plaintiff then demanded the production of this copy, but the production was refused; counsel for defendant maintaining that such demand was made purely for the purpose of laying a foundation for secondary evidence, and an objection on this score was sustained.

The following colloquy then took place:

Mr. McCue: Do you know of your own knowledge Mr. Hansch, what interest Klemstein had in this grain?

Mr. Ellsworth: Objected to as being immaterial, incompetent, irrelevant; no foundation laid for the introduction of such testimony; the witness not having shown his means of knowledge or whether he is qualified to answer concerning the relationship of these parties or the interest of Mr. Klemstein in the grain.

The Court: I will sustain the objection.

Mr. McCue: I will ask Mr. Ellsworth if he has in his possession a lease or a copy thereof, that was in existence between Fred Klemstein and Mr. Cummings, the owner of the land described by this witness, for the year 1913, and if he has, I demand that he produce it.

Mr. Ellsworth: I don't understand that any such demand is proper to be made on counsel, if it was of my client, who is a party to the action, if material evidence is in his possession, there might be a material reason for making that demand.

Mr. McCue: Let me preface my request, by saying: If there is written evidence of this fact, which I have reason to believe there is, that it is in the possession and under the control of the defendant in this action; I also believe that the counsel for the defendant has it in his possession in this court, the instrument referred to.

Mr. Ellsworth: Well, in order to shorten the matter, your Honor, I will say to the court, I do not have in my possession such an instru-

ment, and my client does not have in its possession such an instrument.

Mr. McCue: Have you got a copy of such instrument?

Mr. Ellsworth: I have a copy of such instrument.

Mr. McCue: Will you produce it?

Mr. Ellsworth: Counsel objects to such demand at this time, the demand being made only for the purpose of showing that the original instrument is not in the possession of the counsel for the plaintiff, and for the purpose of laying a foundation for secondary evidence if it is not produced. I take it we are under no obligation to produce the secondary evidence.

The Court: Until it appears that the original cannot be produced, I take that to be the law. It is not competent evidence until that is shown.

Mr. McCue: The attention of your Honor is called to the fact that this evidence is within the breast of the adverse parties.

Mr. Ellsworth: It is in the breast of Mr. Cummins according to your own showing. Mr. Cummins is here if you wish to call him as a witness. You will call him as your own witness, however.

Mr. McCue: I am making my own record in this lawsuit, Mr. Ellsworth, and submit this record to the court.

The Court: In the absence of any showing that the original contract cannot be produced, the maker of it being present, the objection is sustained.

Mr. McCue: We will say for the information of the court that we know of no public record of this instrument, and we have not got in our possession evidence that such instrument is in existence. It is in the possession of Mr. Cummins and the defendant in this action, and that Mr. Cummins, while not a nominal party to this lawsuit, he is here counseling with the defendants in this action, that he is brought here into this court by them as their witnesses.

The Court: If this instrument is in writing, it does not matter who it comes from so far as the instrument is concerned, whether from the plaintiff or the defendant, it would not make any difference in the terms of the contract, if it is in writing.

Mr. McCue: I appreciate that fact, your Honor.

Mr. Ellsworth: I do not represent Mr. Cummins, and Mr. Cum-

mins is here in person to represent himself; and this evidence, if it tends to show anything, shows he has the instrument if it is in existence, and he is the proper person to produce it, and not me.

Mr. McCue: Then you refuse to produce the copy of the instrument which you hold here in court, Mr. Ellsworth?

Mr. Ellsworth: I stated that I do not have in my possession the original lease between Mr. Cummins and Mr. Klemstein.

Mr. McCue: I appreciate that fact, but you have already stated that you have a copy of it?

Mr. Ellsworth: No, I made objection to your demand and the court sustained the objection to the copy.

Mr. McCue: I don't care about any of your instructions: You say that you have a copy of this instrument, and I asked you if you refused my demand to produce this copy of that instrument.

Mr. Ellsworth: Refuse to answer such question, and object to the plaintiff's demand, your demand of such copy of me.

We are fully satisfied that a *prima facie* case was made out by the plaintiff, and that it was not incumbent upon it to introduce the lease in evidence, if a lease there was. The testimony was positive that Klemstein was in possession of the land; that Klemstein had raised the crop; that the mortgage was upon a one-half interest therein, and that all of the crop had been sold to the defendant. The owner of the land, Cummins, is not intervening or claiming any interest therein. Even if there was a lease there is no evidence that its terms were inconsistent with the half ownership of the grain in question by the tenant Klemstein. To our minds the issues in the case have already been settled by this court in the case of *Ellestad v. Northwestern Elevator Co.* 6 N. D. 88, 69 N. W. 44, and *Nichols, S. & Co. v. Barnes*, 3 Dak. 148, 14 N. W. 111.

The judgment of the District Court is reversed and a new trial is ordered.

MERCHANTS NATIONAL BANK OF WIMBLEDON, a Corporation, v. JAMES M. COLLARD and Emma A. Collard, and Anton Fried and Susan Fried.

(157 N. W. 488.)

Vendor — creditor of — fraudulent transfer — action to set aside — hinder — delay — defraud — findings of fact — conclusions of law — supreme court — trial de novo.

1. In an action by a creditor of a vendor to set aside alleged fraudulent conveyances of real property upon the ground that such conveyances were made with intent to hinder, delay, and defraud such creditor, the trial court found adversely to plaintiff's contention, and upon a trial *de novo* in the supreme court the findings of fact as well as the conclusions of law of the lower court are in all things sustained.

Evidence — preponderance of — vendors — hinder — delay — defraud — creditors — facts.

2. The record discloses by a fair preponderance of the evidence that there was no intent on the part of either the vendors or vendees to hinder, delay, or defraud any of the vendors' creditors. In the light of such facts the case of *Paulson v. Ward*, 4 N. D. 100, and other similar holdings cited by appellant, are held in no way applicable to the case at bar.

Vendor — creditor of — conveyance — real estate — in payment of claims — volunteer purchaser — position of — fraudulent intent of vendor — knowledge of.

3. Following *Lockren v. Rustan*, 9 N. D. 43, held, that defendant Fried being a creditor of the vendors, and taking the conveyances in payment of claims

Note.—The right of a creditor to buy property from his debtor in satisfaction of the debt is discussed in note in 36 L.R.A. 335, page 339, taking up the question when the purchaser has knowledge of the intent or effect to defeat other creditors, and saying: "Some cases hold that a creditor preferred, taking property in good faith to secure himself, has the right to hold the property as against other creditors, although he may know that the effect of such transfer was to defeat other creditors; and some of the cases go so far as to hold that in such a case a conveyance will be sustained although the preferred creditor may have known that the debtor intended to defeat other creditors." The cases above seem to incline toward the view of this last statement, and other cases following the same doctrine will be found collated in the note.

See also note in 34 Am. St. Rep. 395, on the knowledge of the vendee of his vendor's fraudulent intent as affecting the validity of the conveyance.

held by him, occupies a more favorable position than a mere volunteer purchaser, and the law would not charge him with fraud, even if to his knowledge the vendors were actuated by such fraudulent intent.

Conveyance — real estate — fraudulent — creditors — pleadings — answer — averments.

4. The appellant's contention that the conveyances should be adjudged to be fraudulent and void because of certain alleged fraudulent averments contained in the answer of the respondents, to the effect that they are owners in fee of the lands, and that the vendors have no interest in or lien thereon, is, for reasons stated in the opinion, held untenable.

Supreme court — trial de novo — trial court — findings of — not controlling — entitled to some weight.

5. Upon a trial *de novo*, the supreme court in deciding the facts acts independently of the trial court's findings, although such findings when based upon oral testimony are of necessity entitled to and will be given some weight.

Option contract — property — purchase of — enforcement of.

6. The contention that Emma Collard, one of the vendors, is entitled to enforce a certain option contract to repurchase the property, *held* not supported by the proof.

Opinion filed February 23, 1916. Rehearing denied April 11, 1916.

Appeal from District Court of Barnes County, *Coffey, J.*

From a judgment in defendant's favor, plaintiff appeals.

Affirmed.

F. B. Lambert, for appellant.

The transfers here involved were in fraud of creditors of the vendor and void. Rev. Codes 1905, § 6637; Civ. Code 1877, § 2023; Rev. Codes 1899, § 5052; Comp. Laws 1913, §§ 5849, 5850; *Paulson v. Ward*, 4 N. D. 100, 58 N. W. 792.

The grantee, at the time of the transfer, had knowledge of the fraudulent intent of the grantor, and such transfer is void for this reason. The grantee's title was tainted with the actual fraud. *Fluegel v. Henschel*, 7 N. D. 279, 66 Am. St. Rep. 642, 74 N. W. 996; *Newell v. Wagness*, 1 N. D. 62, 44 N. W. 1014; *Lukins v. Aird*, 6 Wall. 78, 18 L. ed. 750.

"Any secret reservation in trust for the grantor, not apparent on the face of the papers, but resting wholly in parole, renders the entire transaction void, as against creditors thereby injured." *First Nat.*

Bank v. Comfort, 4 Dak. 167, 28 N. W. 855; Daisy Roller Mills v. Ward, 6 N. D. 317, 70 N. W. 271.

Such transfers are void for reasons of public policy. Fraud, and secret dealing, and bad faith will destroy all such transactions. Baldwin v. Short, 125 N. Y. 553, 26 N. E. 928; Salemonson v. Thompson, 13 N. D. 182, 101 N. W. 324; Morley Bros. v. Stringer, 133 Mich. 690, 95 N. W. 978; Switz v. Bruce, 16 Neb. 463, 20 N. W. 639; Smith v. Konkright, 28 Minn. 23, 8 N. W. 876; North v. Belden, 13 Conn. 376, 35 Am. Dec. 83; Butts v. Peacock, 23 Wis. 359; Strong v. Lawrence, 58 Iowa, 55, 12 N. W. 74; Burt v. C. Gotzian & Co. 43 C. C. A. 59, 102 Fed. 937; Merchants' & M. Sav. Bank v. Lovejoy, 84 Wis. 601, 55 N. W. 108; Gillespie v. Cooper, 36 Neb. 775, 55 N. W. 302; Thompson v. Bickford, 19 Minn. 17, Gil. 1; Daisy Roller Mills v. Ward, 6 N. D. 317, 70 N. W. 271.

As between the parties, grantor and grantee, the conveyance to defraud creditors is valid. McMinn v. Whelan, 27 Cal. 310; Lawton v. Gordon, 34 Cal. 36, 91 Am. Dec. 670; Ybarra v. Lorenzana, 53 Cal. 197; Frink v. Roe, 70 Cal. 296, 11 Pac. 820; First Nat. Bank v. Eastman, 144 Cal. 487, 103 Am. St. Rep. 95, 77 Pac. 1043, 1 Ann. Cas. 626.

Knauf & Knauf, for respondents.

The transaction, as shown by the evidence, related wholly to debts due Fried and secured upon the lands in question. A creditor of the vendor has a right to take a deed of transfer of real estate, and it does not necessarily follow that such transaction is in fraud of the grantor's creditors. There is no finding of fraud in this case. Paulson v. Ward, 4 N. D. 100, 58 N. W. 792; Newell v. Wagness, 1 N. D. 62, 44 N. W. 1014; First Nat. Bank v. Comfort, 4 Dak. 167, 28 N. W. 855; Fluegel v. Henschel, 7 N. D. 279, 66 Am. St. Rep. 642, 74 N. W. 996.

It is the application of the law to the facts in any case, that tells the story. Tested by this rule, there is no evidence of fraud, nor any finding of fraud, in this case. Lukins v. Aird, 6 Wall. 78, 18 L. ed. 750; Daisy Roller Mills v. Ward, 6 N. D. 317, 70 N. W. 271; Salemonson v. Thompson, 13 N. D. 182, 101 N. W. 320.

The findings of the lower court are amply sustained by the evidence, and are entitled to be given weight. Horton v. Emerson, 30 N. D.

274, 152 N. W. 529, and cases cited; Bergh v. John Wyman Farm Land & Loan Co. 30 N. D. 158, 152 N. W. 281; State ex rel. Trimble v. Minneapolis, St. P. & S. Ste. M. R. Co. 28 N. D. 648, 150 N. W. 463; Jasper v. Hazen, 4 N. D. 4, 23 L.R.A. 58, 58 N. W. 454; James River Nat. Bank v. Weber, 19 N. D. 705, 124 N. W. 952; Ruettel v. Greenwich Ins. Co. 16 N. D. 546, 113 N. W. 1029; Dowagiac Mfg. Co. v. Hellekson, 13 N. D. 265, 100 N. W. 717.

FISK, Ch. J. This is an appeal from a judgment of the district court of Barnes county and is here for trial *de novo*.

Plaintiff bank as a judgment creditor of the defendant, James Collard, seeks to set aside and have adjudged void certain alleged fraudulent conveyances of real property executed and delivered by such defendant and his wife, Emma Collard, to the defendants Anton and Susan Fried. The same attorney who brought this action commenced a similar action for the Royal Elevator Company against the same defendants, which action involved the same issues, and by consent of all parties the two actions were consolidated and tried as one action in the court below, but separate findings, conclusions, and judgments were entered in each. No question is raised as to the right of these plaintiffs to maintain such actions, it being conceded or at least not questioned, that they each had, prior to the commencement of the actions, duly acquired a lien by judgment and levy of execution upon any interest held by the Collards in the real property in controversy. The crucial and in fact about the only issue raised by the pleadings is as to whether the deeds from the Collards to the Frieds were void as in fraud of Collards' creditors.

The learned trial court, after hearing the testimony which was practically all oral, resolved such issue in favor of the defendants, and after duly considering such testimony as best we can from the typewritten record, we deem such findings in accord with the preponderance of the evidence, and we adopt them as our findings on this appeal. The record is quite voluminous, and it would serve no useful purpose to attempt a review of the testimony in this opinion, and we shall refrain from so doing.

We, however, deem it proper to here set forth the substance of the findings and conclusions of the trial court. They are as follows:

1. Plaintiff is a domestic corporation.

2. Defendants James M. and Emma A. Collard are husband and wife, each having full authority to represent the other in all the transactions involved herein.

3. That defendants Anton and Susan Fried are husband and wife with like authority of each to represent the other in all such transactions.

4. That on July 16, 1914, plaintiff bank duly recovered and caused to be docketed in Barnes county a judgment by confession against James M. Collard for the sum of \$869.79, which judgment is of record and wholly unsatisfied, and which judgment was for an indebtedness incurred more than three years prior thereto.

5. That on or about August 31, 1914, an execution was duly issued on such judgment, and on or about September 2, 1914, the same was returned nulla bona. On September 4, 1914, an alias execution was duly issued, and after indorsing thereon his inability to find any personal property upon which to levy, the sheriff in due form levied upon all the real property in controversy, giving due notice thereof to defendant James Collard, which levy is still in full force.

6. That on June 22, 1911, the Collards, for a good and valuable consideration, executed and delivered to defendant Anton Fried a warranty deed to a portion of the land in controversy, to wit, the west half of the east half of sec. 6, twp. 143, R. 60 in Barnes county, which deed was duly recorded on July 12, 1911. Such deed was given subject to a mortgage for \$1,800, and a commission mortgage for \$90 running to one Charles H. Smith. At the time this deed was executed and delivered and as a part of the same transaction, defendant Anton Fried gave to the Collards a contract agreeing to reconvey said land to them upon the payment of \$4,050, with interest on \$1,800 thereof at 7 per cent, and the balance of said sum of \$4,050 was represented by a note for \$2,250 in favor of Anton Fried. Defendant Collard retained possession of the land under such contract. Thereafter and on August 2, 1913, the Collards transferred by warranty deed the other lands described in the complaint, consisting of three quarters owned by James M. Collard, to the defendant Susan Fried, for an expressed consideration of \$1. Such deed contained a covenant that such land was free from encumbrance, except a mortgage to the Middlesex Bank-

ing Company, one to Moore Brothers, and one to Anton Fried. This deed was duly recorded on August 6, 1913. As a part of such transaction the Collards on said date delivered up for cancelation to the Frieds, the contract for the purchase of the quarter first described; the consideration for the surrender of such contract and the giving of the two deeds above described transferring all right, title, and interest to the Collards to the lands described in such deeds, to Anton and Susan Fried respectively, being the agreed price of \$30 per acre or a total of \$19,200, it being then and there agreed between the defendants that Susan and Anton Fried would assume the encumbrances against said land as a part of the purchase price, and would deduct from such purchase price, in addition to such encumbrances, all accounts owing by the Collards to them or either of them, paying any balance found to be due on such purchase price to James M. Collard. Upon an accounting, it was found that the amount of such encumbrances thus assumed, together with the amount owing on account of Anton Fried, aggregated the sum of \$17,418.24, leaving a balance still due on such purchase price of \$1,881.76, and that to this extent, with interest thereon at the rate of 7 per cent per annum from the date of such sale, the defendant James M. Collard at the time of the commencement of this action had and ever since has retained an equity in such land, and the Frieds hold title to such land in fee, subject only to such equity in James M. Collard.

7. That by virtue of the execution and levy hereinbefore mentioned the plaintiff has a lien upon all such land for the sum of \$80.09, being the balance of Collard's equity aforesaid after satisfying the prior lien held by the Royal Elevator Company, the plaintiff in the companion action, and that upon the payment of such sum, the defendants Anton and Susan Fried respectively shall be adjudged to be the fee owners of such lands, free and clear of all claims asserted by the plaintiff bank.

From the foregoing findings of fact the trial court made conclusions of law to the effect that the plaintiff bank is entitled to judgment against the defendants Anton and Susan Fried for the sum of \$80.09, the balance thus due on the purchase price of such land, and that such sum be made a specific lien thereon, and, when paid, the same shall be applied upon the judgment against the Collards. Further, adjudg-

ing that Anton Fried and Susan Fried respectively are the owners in fee simple of the lands in controversy subject only to the encumbrances of record and the balance thus found to be due on the purchase price, as against this plaintiff, and that when the provisions of this judgment are carried out by the defendants Anton and Susan Fried, the title to such lands shall be adjudged to be in said Frieds respectively in accordance with their deeds, free and clear of all claim made by the other parties to this action.

In the light of the facts thus found by the trial court and which, as before stated, we deem fully established by a preponderance of the testimony, we entertain no doubt as to the correctness of the decision below. The law relative to alleged fraudulent conveyances is too firmly settled to require extended notice, and were it not for the elaborate brief and argument of appellant's counsel wherein he has industriously cited numerous authorities from this and other courts which he strenuously insists are in point and controlling in his favor, we would feel justified in concluding this opinion with a mere statement of our conclusion that the facts disclosed in this record require an affirmance of the judgment. However, in view of counsel's very earnest contentions, we deem it but fair to him and to his clients that we set forth at some length the reasons which impel us to overrule his contentions as to the rules of law applicable to the case.

We freely admit that if the facts were as contended by counsel we would readily agree with him as to the rules of law here applicable. We may say here that we have no quarrel whatever with the rules enunciated in the cases cited. These cases are: *Paulson v. Ward*, 4 N. D. 100, 58 N. W. 792; *Fluegel v. Henschel*, 7 N. D. 276, 66 Am. St. Rep. 642, 74 N. W. 996; *Newell v. Wagness*, 1 N. D. 62, 44 N. W. 1014; *Daisy Roller Mills v. Ward*, 6 N. D. 317, 70 N. W. 271; *Salemonson v. Thompson*, 13 N. D. 182, 101 N. W. 320; *Baldwin v. Short*, 125 N. Y. 553, 26 N. E. 928; *Morley Bros. v. Stringer*, 133 Mich. 690, 95 N. W. 978; *Thompson v. Bickford*, 19 Minn. 1, Gil. 1; *North v. Belden*, 13 Conn. 376, 35 Am. Dec. 83; *Merchants' & M. Sav. Bank v. Lovejoy*, 84 Wis. 601, 55 N. W. 108. These cases no doubt were correctly decided on the facts before the court; but let us briefly distinguish the case at bar from the cited cases. In the case at bar the conveyances attacked were each made for the fair and reasonable value

of the lands conveyed, not only this, but what is of still more vital importance, such conveyances were thus made without any intent either upon the part of the vendors or vendees to defraud any of the vendor's creditors, or to hinder or delay them in the collection of their claims; nor was there any secret trust reserved in such lands for the benefit of the vendors. This is all that need be stated to differentiate the cases; for it will be found, we think without exception, that each of the cited cases was based upon facts showing either a voluntary transfer without consideration, or an intent on the part of the vendor, or on the part of both vendor and vendee, to place the property beyond the reach of the former's creditors, with the fraudulent intent to cheat and defraud such creditors, or to hinder and delay them in the collection of their claims, or that a secret trust was reserved in the vendor with like intent.

Before leaving this branch of the case, we will briefly notice appellant's principal authority—*Paulson v. Ward*, 4 N. D. 100, 58 N. W. 792,—upon which they so confidently rely as conclusive in their favor upon the proposition that the conveyances in question were fraudulent and void. A cursory examination of the opinion in that case will readily disclose that it is not in point. At page 108 of the opinion it is stated: "There is left little opportunity to doubt the intent on the part of the grantors to hinder, delay, and defraud their creditors. Did the grantee Patterson know of that intent when he took the conveyances? The trial court answers in the affirmative." The opinion goes on to give reasons why the trial court's conclusion was correct, and at the close of the opinion at page 112 they say: "It is clear that he (Patterson, the vendee) participated in the purpose" (to hinder, delay, and defraud the creditors of the Wards and Hall). Manifestly, such case is not an authority in a case like the one at bar, where neither the grantors nor the grantees were actuated by such a fraudulent intent. The same may be said as to each of the other cases cited, and further comment on them would be wholly useless.

The fact that the respondent Fried was a creditor of Collard places him in even a more favorable light than a purchaser who was not a creditor, for even if the record disclosed that Collard, in making the conveyances, was actuated by an intent to defraud some of his creditors, and Fried had knowledge of this, the law would not charge him

with fraud by reason of such knowledge. *Lockren v. Ruston*, 9 N. D. 43, 1 N. W. 60. Chief Justice Bartholomew in speaking for the court in that case, among other things very properly said: "The reasons that have been assigned for the distinction between one who purchases for a present consideration and one who purchased in satisfaction of a pre-existing debt are sound and unassailable. The former is in every sense a volunteer. He has nothing at stake,—no self-interests to serve. He may, with perfect safety, keep out of the transaction. Having no motive of interest prompting him to enter it, if yet he does enter it, knowing the fraudulent purpose of the grantor, the law, very properly, says that he enters it for the purpose of aiding that fraudulent purpose. Not so with him who takes the property in satisfaction of a pre-existing indebtedness. He has an interest to serve. He can keep out of the transaction only at the risk of losing his claim. The law throws upon him no duty of protecting other creditors. He has the same right to accept a voluntary preference that he has to obtain a preference by superior diligence. He may know the fraudulent purpose of the grantor, but the law sees that he has a purpose of his own to serve, and, if he go no further than is necessary to serve that purpose, the law will not charge him with fraud by reason of such knowledge."

But as stated above, in the case at bar the record discloses not only that Fried had no knowledge of any such fraudulent intent on the part of the vendors, but, on the contrary, that no such intent was shown either on the part of the vendors or the vendees. The lands were heavily encumbered, and the Collards were anxious to sell the same and satisfy the indebtedness against it. A price of \$30 per acre, the fair and reasonable value, was agreed upon, or \$19,200 for the section, and the aggregate amount of the liens thereon, together with the sum owing to Fried by the Collards which it was agreed should be satisfied out of the purchase price, was approximately \$17,319, leaving a balance due Collard from Fried on such purchase price of \$1,881, which balance had not been paid. This balance the trial court held should be apportioned between the plaintiff bank and the Royal Elevator Company, plaintiff in the companion action, according to the priority of their respective liens, and the latter's claim has been fully satisfied.

It is, among other things, now claimed by this appellant that the deeds should be adjudged to be fraudulent and void as alleged in the

complaint, because in their answer the Frieds alleged that they are the owners in fee simple of the lands, and that the same are free from any claim or interest in or lien upon the same in favor of the Collards, later repeating such averments in their affidavit and demand for a release of the levy served upon the sheriff. Attention is called to the fact that these averments were untrue and fraudulent in that, as the trial court found, there was a balance of \$1,881.76 still due the Collards on the purchase price for which they are entitled to a vendor's lien. This contention is clearly without merit for at least two reasons: First, fraud which would operate to avoid these conveyances must have existed at the time of and as a part of such transfers, and to be of any avail in this action such fraud, of course, must have taken place prior to the commencement of the action; second, the trial court correctly found that there was no such fraud in fact. It is clear that this balance remained unpaid merely through inadvertence and oversight on the part of Fried's bookkeeper, who testified in effect that in making up the statement as to liens against the property she included all liens of record, and that the item of \$1,880 covering the Chas. H. Smith mortgage was thereby inadvertently included when as a matter of fact such indebtedness had been previously included in another form. Her testimony on this point is undisputed. For these reasons we fail to see how appellant's contention on this point has any merit.

In arriving at our conclusion on the facts we deem it proper to state that we do so independently of the trial court's findings; although such findings, being based upon oral testimony, are of necessity entitled to some weight in this court. Counsel for respondent is clearly in error, however, in contending for the rule announced in *Jasper v. Hazen*, 4 N. D. 1, 23 L.R.A. 58, 58 N. W. 454; *Bergh v. John Wyman Farm Land & Loan Co.* 30 N. D. 158, 152 N. W. 281; *Semple v. Burke*, 26 N. D. 201, 144 N. W. 103; *State ex rel. Trimble v. Minneapolis, St. P. & S. Ste. M. R. Co.* 28 N. D. 621, 150 N. W. 463; *Dowagiac Mfg. Co. v. Hellekson*, 13 N. D. 257, 100 N. W. 717, and other like cases, holding to the effect that the findings of the trial court have the force of special findings of a jury. These cases have no relevancy to appeals triable *de novo*. *Jasper v. Hazen* was decided long prior to the enactment of the trial *de novo* statute, and the other cases were not here for trial *de novo*, but merely for review of errors. The rule as to the weight to be

given by this court to the findings of the lower court in cases for trial *de novo* is stated in *Christianson v. Farmers' Warehouse Asso.* 5 N. D. 438, 32 L.R.A. 730, 67 N. D. 300, as follows: "The judgment of the trial court upon the facts must still have weight and influence in this court, especially when based upon the testimony of witnesses who appeared in person before that court. It may be that the strong presumption of correctness under which findings of fact came to this court under the former practice does not follow them with equal force under this statute, and it may be that to some extent the appellant is relieved from the burden of pointing out the specific error of the trial court. . . . Nevertheless, the independent judgment of this court upon the record presented, irrespective of what the trial court may or may not have held, is based only upon a review of the record made in the trial court." See also *Englert v. Dale*, 25 N. D. 587, 597, 142 N. W. 169.

Counsel for appellants finally insists that Emma A. Collard should at least be held to have a right to purchase these lands back from the Frieds under the so-called option contract, exhibit P-1. The contract shown by such exhibit is very ambiguous, and fails to state the terms of the agreement; it merely stating that the Frieds agree to give to Emma A. Collard a crop contract covering these lands, such option being good only for one year from its date,—December 15, 1913. In the light of the record we are unable to hold that Emma A. Collard ever availed herself of the option aforesaid by complying with the terms and conditions thereof, and we are agreed that the learned trial court properly reached its conclusion that the only claim held to these lands by the Collards was and is a claim to the balance of the purchase price remaining unpaid.

For the above reasons the judgment below was correct, and the same is in all things affirmed.

O. S. LEE v. ST. ANTHONY & DAKOTA ELEVATOR COMPANY, a Corporation.

(157 N. W. 689.)

This case is governed by *Lee v. Imperial Elevator Co.* 34 N. D. 1, just decided by this court. In this case, however, exception is taken to the remarks of one of the counsel for plaintiff, who asserted that it was the policy of corporations to fight claims of this class, whether right or wrong. The court immediately admonished the jury that there was no evidence supporting such statement and to disregard the same. *Held* that the incident was without prejudicial error.

Opinion filed March 7, 1916.

Appeal from the District Court of Nelson County, *Cooley, J.*

Affirmed.

H. A. Libby, for appellant.

A. V. A. Peterson (Frich & Kelly, and S. G. Skulason, of counsel), for respondent.

BURKE, J. The facts in this case are in most particulars identical with those in *Lee v. Imperial Elevator Co.* 34 N. D. 1, 157 N. W. 688, just decided by this court. That opinion governs herein so far as it goes, but there is one point in this case which did not occur in the other and requires separate mention. During argument to the jury, plaintiff's attorney criticized corporations in general, and said that it was their policy to fight these cases whether right or wrong. Exception being taken to the remarks, the trial judge admonished the jury as follows: "You are to understand that you are to take into consideration only the evidence which has been given you by the witnesses, or such documentary evidence as may have been introduced here on the trial of this lawsuit, and you are not to take statements of counsel on either side if they are not borne out by this evidence,—and of course there is no evidence in this case that corporations have any such policy as was stated by counsel." Appellant insists that those remarks of counsel were so prejudicial that the admonition of the trial court could not cure the damage. However, we are of the opinion that there is no prejudicial error in the incident. Judgment is affirmed.

H. M. ORFIELD, formerly H. M. Olson, v. J. K. HARNEY.

(157 N. W. 124.)

Prior written contract — changes — by correspondence — agreement — contract and correspondence — construed from.

1. Where parties by correspondence agree to certain changes in the terms of a prior written contract, the agreement between the parties will be gathered from the written contract and the correspondence considered as a whole.

Agreement — breach of — real estate transfer of — pecuniary compensation — specific performance.

2. It is presumed that the breach of an agreement to transfer real property cannot be adequately relieved by pecuniary compensation, and ordinarily a court of equity will enforce specific performance thereof.

Equity — court of — specific performance — jurisdiction — may retain — decree — enforcement.

3. A court of equity may retain jurisdiction of an action in specific performance and enforce compliance with its decree.

Findings — evidence — sufficient to support — real property — owner — able to convey.

4. Evidence considered and held sufficient to justify a finding that defendant was the owner of, and able to convey, real property.

Vendee — specific performance — contract — awarded — damages — vendor — conveyance — delay.

5. The vendee may be awarded specific performance of a contract to transfer real property, and damages against the vendor for delay in conveying, in the same action.

Complaint — allegations — damages — award of.

6. Ordinarily damages cannot be awarded in an amount exceeding that alleged and demanded in the complaint.

Opinion filed March 8, 1916.

From a judgment of the District Court of Benson County, *Buttz, J.* Defendant appeals.

Affirmed as modified.

T. H. Burke, for appellant.

A breach of a contract consists of "the violation or nonfulfilment of an obligation, contract, or duty."

"The Commission of some act or the omission of an act specified or implied in the contract." Black's Law Dict.; *People ex rel. Johnson v. New York Produce Exch.* 8 Misc. 552, 29 N. Y. Supp. 307; *James v. Adams*, 16 W. Va. 267; *Davis v. Bronson*, 2 N. D. 300, 16 L.R.A. 655, 33 Am. St. Rep. 783, 50 N. W. 836.

Where a contract is not breached before the commencement of the action, it is improperly brought. *Davis v. Bronson*, *supra*; *Ward v. American Health Food Co.* 119 Wis. 12, 96 N. W. 388, and authorities cited.

A party to an executory contract may stop performance by an explicit order and will subject himself to such damages as will compensate the other party for being deprived of its benefits. *Davis v. Bronson*, 2 N. D. 300, 16 L.R.A. 655, 33 Am. St. Rep. 783, 50 N. W. 836.

If an action for damages for the refusal on the part of the vendee to accept goods as agreed, the measure of damages is the difference between the market value of the goods at time of breach and the price the vendee agreed to pay. *T. B. Scott Lumber Co. v. Hafner-Lothman Mfg. Co.* 91 Wis. 667, 65 N. W. 513; 13 Cyc. 168; *Talbot v. Boyd*, 11 N. D. 81, 88 N. W. 1026; *Pratt v. S. Freeman & Sons Mfg. Co.* 115 Wis. 648, 92 N. W. 368; *Kelley v. La Crosse Carriage Co.* 120 Wis. 84, 102 Am. St. Rep. 971, 97 N. W. 674; *Anderson v. Savoy*, 137 Wis. 44, 118 N. W. 217; *Pollen v. Le Roy*, 30 N. Y. 549; *Brownlee v. Bolton*, 44 Mich. 218, 6 N. W. 657; *Cohen v. Platt*, 69 N. Y. 348.

The court erred upon the question of the failure to accept the personal property here involved, and also as to the matter of damages. *Comp. Laws* 1913, § 6573; *Hayes v. Cooley*, 13 N. D. 204, 100 N. W. 250; *Malueg v. Hatten Lumber Co.* 140 Wis. 381, 122 N. W. 1057.

This is an executory contract. Since the defendant never made the selection of the goods necessary to accept them, he in no way assumed ownership. The plaintiff kept the goods and paid all assessments against them. *T. B. Scott Lumber Co. v. Hafner-Lothman Mfg. Co.* 91 Wis. 667, 65 N. W. 513; *Todd v. Gamble*, 148 N. Y. 382, 52 L.R.A. 225, 42 N. E. 982; *Allen v. Jarvis*, 20 Conn. 38; *Stanford v. McGill*, 6 N. D. 573, 38 L.R.A. 760, 72 N. W. 938; *Reeves & Co. v. Bruening*, 13 N. D. 166, 100 N. W. 241; *Minneapolis Threshing Mach. Co.*

v. McDonald, 10 N. D. 408, 87 N. W. 993; Talbot v. Boyd, 11 N. D. 81, 88 N. W. 1026.

There was an actual loss due to Olson's failure to place the goods upon the market and have them sold. Pratt v. S. Freeman & Sons Mfg. Co. 116 Wis. 648, 92 N. W. 368; Cohen v. Platt, 69 N. Y. 348, 25 Am. Rep. 203.

When a vendee refuses to accept goods for which he has bargained, the vendor has the option to elect as to one of three remedies,—treat the property as the vendee's and sue for contract price; sell the property on notice, at market price, and sue for any difference, or he may regard the contract as forfeited, and retain the property as his own, and sue vendee for damages for nonperformance, in which case the damages are limited to the difference between contract price and market value. Cohen v. Platt, *supra*; Mason v. Decker, 72 N. Y. 595, 28 Am. Rep. 190; Bigelow v. Legg, 102 N. Y. 652, 6 N. E. 107.

The election as to the form of the remedy pursued in this action is binding upon the vendor, and, once secured, is conclusive. Moller v. Tuska, 87 N. Y. 169; Hadley v. Baxendale, L. R. Exch. 341, 2 C. L. R. 517, 23 L. J. Exch. N. S. 179, 18 Jur. 358, 2 Week. Rep. 302, 5 Eng. Rul. Cas. 502; Guetzkow Bros. Co. v. A. H. Andrews & Co. 92 Wis. 214, 52 L.R.A. 209, 53 Am. St. Rep. 909, 66 N. W. 119; Hayes v. Cooley, 13 N. D. 204, 100 N. W. 250.

If he by his negligence or wilfulness allows the damages to be enhanced, the increased loss which was avoidable by the performance of his duty falls upon him. Sutherland, Damages, 3d ed. § 88, and authorities cited.

Market price or value is determined as at the point where delivery was to be made. Guillon v. Earnshaw, 169 Pa. 463, 32 Atl. 545; Thurman v. Wilson, 7 Ill. App. 312.

The seller is not permitted to recover the entire value of the goods, under such circumstances as here presented, but the loss that he has actually sustained by reason of the breach. 21 Am. & Eng. Enc. Law, 578; Dreyfuss v. Foster, 3 N. Y. Supp. 54.

L. O. Rue and Victor Wardrobe, for respondent.

Letters may constitute a contract for the sale or exchange of real estate upon which specific performance may be decreed. Mitchell v.

Knudtson Land Co. 19 N. D. 737, 124 N. W. 946; Foster v. Furlong, 8 N. D. 282, 78 N. W. 986.

A court of equity, having once gained jurisdiction, may retain the same to enable it to enforce its orders, or compel observance thereof; if defendant had placed himself in position so that he could not perform, then the court could enforce judgment for damages. Mitchell v. Knudtson Land Co. *supra*.

The plaintiff, in an action for specific performance, may recover damages for withholding possession, and delay in conveying when performance is decreed. Beddow v. Flage, 22 N. D. 53, 132 N. W. 637; Pillsbury v. J. P. Streeter, Jr. Co. 15 N. D. 174, 107 N. W. 40.

CHRISTIANSON, J. This is an action to compel the specific performance of a contract for the exchange of a tract of land for a certain stock of merchandise, and to recover damages sustained by the plaintiff by reason of defendant's refusal to comply with the terms of such contract. The trial court made findings and conclusions in favor of the plaintiff, and defendant has appealed from the judgment entered thereon, and demanded a trial *de novo* in this court.

There is no serious dispute with respect to the transaction out of which this litigation grew. The plaintiff was the owner of a stock of goods in Minneapolis. The defendant inspected this stock and examined the invoices showing the invoice prices of the several articles contained therein, and after such inspection, on July 24, 1912, entered into the following written contract with the plaintiff:

This agreement made this 24th day of July, 1912, by and between J. K. Harney of Brinsmade, county of Benson, state of North Dakota, party of the first part, and H. M. Olson, of Minneapolis, county of Hennepin, state of Minnesota, party of the second part.

Witnesseth, That the said party of the first part, in consideration of the covenants and agreements hereinafter mentioned, on the part of the party of the second part, to be kept, done, and performed, does hereby agree to sell and convey by general warranty deed free from any encumbrance, except a mortgage of sixteen hundred (\$1,600) dollars, and interest from February 4, 1912, at 7 per cent, unto the said party of the second part, his heirs or assigns, all the following described

land situated in Todd county, Minnesota, to wit: The southeast quarter, (S. E. $\frac{1}{4}$) of sec. 26, township 133, range 34, containing 160 acres more or less according to government survey, said land being taken at the agreed price of thirty-five (\$35) dollars per acre, leaving an equity after deducting interest from February 4, 1912, to August 4, 1912, of three thousand nine hundred and forty-four dollars (\$3,944).

In consideration of which the party of the second part agrees to sell and convey by bill of sale free from any encumbrance f. o. b. cars at Minneapolis, Minnesota, to the party of the first part, his heirs or assigns, the following described stock of goods, situated in Hennepin county, Minnesota, to wit: Part of that certain stock of merchandise consisting principally of ladies' clothing, men's and boys' suits, shoes, and rubbers and other goods, situated on the second floor at No. 2304 Twenty-fifth ave. So., Minneapolis, same being inspected by said first party, to the amount of thirty-nine hundred and forty-four (\$3,944) dollars to cover equity in said land as above, same to be selected by said second party from the \$4,245 stock.

It is agreed that said second party or his agent may view property of first party above mentioned, and if found to be otherwise than as represented, or as understood by said second party, this agreement to be null and void, otherwise to be binding upon both parties.

It is agreed that an abstract of title brought down to date, to the above land, shall be furnished by the first party hereto, and should there be any defect in the title of either, the party whose title is defective hereby agrees that the said defect or defects shall be made good and the title perfected within sixty days from date hereof at his own cost and expense.

It is agreed that all papers shall be executed and delivered at the expense of the prospective parties, on or before the 4th day of August, A. D. 1912.

In testimony whereof, both parties have hereunto set their hands and seals the day and year first above written.

J. K. Harney (Seal)

H. M. Olson (Seal)

Signed, sealed, and delivered in presence of

Ruth Ryberg,

William W. Powers.

On July 27, 1912, the plaintiff wrote defendant as follows:

July 27, 1912.

Mr. J. K. Harney,
Brinsmade, N. Dak.

Dear Sir:—

My brother has just returned from Todd county, where he inspected your 160 acres tract, and, I regret to say, found it of such a nature that we could not deal as proposed. He measured the two patches of field and found a total of only twenty-nine (29) acres, whereas I understood it to be 70 acres cultivated. You evidently meant including the open meadow. Well, the meadow is largely wire-grass. Well, there is no use of saying unkind things about the land. It has many advantages too, but everybody spoke of it being worth from twenty to thirty dollars per acre. I would be willing to give you the benefit of the highest quotation and allow you thirty dollars (\$30), this giving you thirty-one hundred and forty-four dollars (\$3,144) worth of stock otherwise on basis of contract signed, stock delivered f. o. b. at Minneapolis. . . . This is positively the very best I can do. Please notify me at once whether accepted or not.

Yours truly,
(Signed) H. M. Olson.

To this letter, defendant replied as follows:

August 10, 1912.

Mr. H. M. Olson,
Minneapolis, Minn.

Dear Sir:—

With regret, but as I remember right, I told you there was 70 acres of plow land on said farm, and I really believe yet it is there. I am afraid your brother did not see the south field at all, but *nevertheless*, if you will change the reading of the agreement and let me pick \$3,144 worth of goods from the stock as the contract reads, I will make ready to close the deal, as I am in a position to handle the goods, and will get them out of your way shortly. I had a letter from Mrs. J. J. Blake, asking me some questions about the stock. The land is the north half

and southwest quarter of southwest quarter, sec. 4, township 153, and range 71.

Yours truly,
(Signed) J. K. Harney.

On August 12, 1912, plaintiff wrote defendant a letter wherein he unqualifiedly accepted the offer contained in defendant's letter of August 10, 1912. Certain correspondence followed, some of which is not material. But on August 8, 1912, defendant wrote plaintiff in part as follows: "I am looking after abstract, and as you know we are in the harvest field. It may be a little tardy, but not very late,—I will write again." On September 16, 1912, plaintiff wrote defendant a letter insisting that the transfer be completed. To this letter defendant replied as follows:

Brinsmade, N. D., Sep. 23, 1912.

Mr. H. M. Olson,
Mpls, Minn.

Dear Sir:—

I plainly see that you are getting rather anxious. I have been so busy I could not think of getting away. I will be in or send a man in within the next two weeks, so just rest easily. Abstract will be up to date.

Yours resp.
J. K. Harney.

In subsequent correspondence and telephone conversations, plaintiff repeatedly insisted that the transaction be completed, offered performance on his part, and demanded the same from defendant, but the defendant failed to comply with the agreement, and finally in the latter part of December, 1912, flatly refused to do so, whereupon plaintiff brought this action.

In his complaint, plaintiff sets forth two causes of action. The first cause is for the specific performance of the contract of exchange. The second cause of action consists of a reaverment of all the allegations contained in the first cause and additional averments to the effect "that because of defendant's failure, neglect, and refusal to make his selec-

tion from said stock of goods, this plaintiff has been obliged to keep said stock intact and in storage . . . and that the costs and expenses of said storage is due solely to said failure, neglect, and refusal on the part of said defendant to make his selection of said stock and to receive the said stock from the plaintiff. . . . That there is now due and owing from defendant to the plaintiff on such storage the sum of \$65." The relief prayed for in the complaint is that plaintiff be required to specifically perform his part of the contract, and, in case of his inability or refusal to do so, that plaintiff have judgment for the reasonable value of the land, less the existing encumbrances against the same; and that plaintiff have judgment upon the second cause of action in the sum of \$65, with interest. The answer admits that defendant is a resident of Benson county, North Dakota; and *that defendant on or about July 24, 1912, represented to plaintiff that he was the owner of the tract of land in question* and offered to exchange the same for plaintiff's stock of goods; that defendant inspected the said stock of goods and examined the invoices showing the invoice price of the several articles contained in said stock, and that after such inspection, the plaintiff and defendant entered into the written contract hereinabove set forth. Aside from such and other admissions, the answer is in effect a general denial.

On the first cause of action the court entered judgment requiring the defendant to specifically perform the contract by selecting goods from the stock to the amount of \$3,144 according to invoice prices, and by executing and delivering to plaintiff a warranty deed to the 160 acre tract of land in Todd county, Minnesota, in accordance with the terms of the contract, within twenty days from the date of the entry of judgment; and the judgment further provided that if defendant fails, neglects, or refuses to execute and deliver said deed within the time ordered, that plaintiff may apply to the court for such further orders and for such further proceedings as may be necessary to compel the observance and performance of the orders of the court; and that if, after the expiration of said twenty days, it shall be made to appear to the court that defendant has transferred or conveyed said land, or is unable to convey title to plaintiff, that then plaintiff have judgment against the defendant as damages in the sum of \$144, with interest at the rate of 7 per cent per annum from April 6, 1914. On the second

cause of action the court ordered judgment in favor of the plaintiff for \$198, and interest.

(1) Appellant's first contention is that the contract executed July 24, 1912, was terminated by plaintiff's letter of July 27, 1912, and that the trial court erred in holding that such original contract was modified by the subsequent letters between the parties. Appellant contends that the original contract must be entirely disregarded, and the contract, if any, gathered solely from the subsequent letters. It is immaterial whether we adopt the construction of the trial court, or the one contended for by the appellant. The result must be the same. In the letter of July 27, 1912, plaintiff notified defendant that he would not deal on the terms outlined in the contract, but in the same letter he offered to make the deal stipulated for in the contract on the condition that the price of the land be reduced \$5 per acre. No other change is suggested. In his reply defendant made the further condition that plaintiff "*change the reading of the agreement and let me (defendant) pick \$3,144 worth of goods from the stock, as the contract reads.*" It will be noticed that in the letter (the conditions of which were agreed to and unqualifiedly accepted by plaintiff), defendant expressly refers to a modification or change of the contract. And defendant further states that if this condition is agreed to, that he will make ready to close the deal and get the goods out of plaintiff's way shortly. The subsequent correspondence clearly shows that both parties considered that the trade had been fully agreed upon. Either these letters modified the original contract, or else they constituted a new contract. In either event the former contract as modified by the letters constitutes the contract between the parties, as the letters by reference to the former contract clearly indicate the intention of the parties to be that such former contract as modified by the letters shall constitute the agreement between them. This court has held that specific performance may be compelled of a contract evidenced only by letters. See *Mitchell v. Knudtson Land Co.* 19 N. D. 737, 124 N. W. 946.

(2) Appellant next contends that the court erred in requiring defendant to select \$3,144 worth of goods, and in retaining jurisdiction of the case to enforce the provisions of its judgment. Appellant's counsel says: "It is outside the provisions of any court to decree that the defendant should select such goods when he declined so to do. It is

his right to repudiate his contract and pay what damage there has been done." This contention is untenable.

"Where land or any estate or interest in land is the subject-matter of the agreement, the jurisdiction to enforce specific performance is undisputed, and does not depend upon the inadequacy of the legal remedy in the particular case. It is as much a matter of course for courts of equity to decree a specific performance of a contract for the conveyance of real estate, which is in its nature unobjectionable, as it is for courts of law to give damages for its breach. Equity adopts this principle, not because the land is fertile, or rich in minerals, but because it is land, a favorite and favored subject in England and every country of Anglo-Saxon origin. Land is assumed to have a peculiar value, so as to give an equity for specific performance, without reference to its quality or quantity." (36 Cyc. 552.)

The rule announced by Cyc. was recognized by our legislature, and made part of our statutory law. See §§ 7189, 7194, Comp. Laws 1913. The power of a court of equity to retain jurisdiction and enforce performance of its decrees has received the sanction of this court, and is recognized by the highest authorities. See *Mitchell v. Knudtson Land Co.* supra; Pom. Eq. Jur. 3d ed. §§ 428, 1317, 1318; Pom. Eq. Rem. § 12; 16 Cyc. 499; 36 Cyc. 794.

(3) The defendant also complains because the court found the defendant to be the owner of the land. It is admitted by the pleadings that defendant represented himself to be the owner of the land at the time the contract was executed. Defendant's grantor was examined as a witness, and testified to the fact that he sold and conveyed the land to the defendant. Under the laws of this state, "it is presumed that a person is the owner of property from exercising acts of ownership over it or from common reputation of his ownership," and "that a thing once found to exist continues as long as is usual with things of that nature." (Comp. Laws 1913, subdiv. 12 and 32, § 7936.)

It is undisputed that at a date prior to the execution of the contract of exchange, the premises involved herein were sold and conveyed to the defendant by the former owner thereof. It is conceded that, prior to and at the time of the execution of the contract of exchange, defendant represented himself to the plaintiff to be the owner of such premises. After such representations, and pretending to be such owner, he exe-

cuted the contract. He did not see fit to testify upon the trial or offer any evidence whatever to show that he was not such owner, or that he is unable for any reason to convey the premises. It is difficult to see how defendant can complain of the finding in question.

In discussing a somewhat similar question in *Mitchell v. Knudtson Land Co.* 19 N. D. 736, 743, 124 N. W. 946, this court, speaking through Chief Justice Morgan, said: "The record shows that the defendant held this land under a contract for its purchase which included other land, and the defendants' vendors refused to deed the land in suit unless the whole contract was complied with by paying the balance due on all land included in the contract. There is no showing that defendant cannot secure the conveyance of this land upon making such payment. If the defendants were unable to make such payments, that is not a showing of such inability to convey as would afford some reason for not conveying, which would warrant a court of equity in withholding its decree for specific performance. The most that can be said in this case is that it might be inconvenient for the defendants to arrange matters so that a conveyance can be given to plaintiff. The facts show that the defendants have refused to convey to plaintiff, pursuant to the contract, and this is sufficient to warrant a decree compelling a specific performance."

(4) The defendant next contends that the court adopted an erroneous basis in determining the amount of damages. The evidence shows that the defendant informed plaintiff in the latter part of December, 1912, that he (defendant) would not perform. This action was commenced shortly thereafter, but was not brought on for trial until April 6, 1914.

The trial court made a finding that the amount of merchandise to be selected by the defendant from the stock of goods (of an invoice value of \$3,144), at the time of the trial, had an actual cash value of not to exceed \$1,400. Appellant therefore contends that the trial court must have based its alternative judgment for damages upon the value of the stock of goods as of the date of the trial, and not as of the date of the breach of the contract. And it is argued that under the holding of this court in *Hart-Parr Co. v. Finley*, 31 N. D. 130, L.R.A. 1915E, 851, 153 N. W. 137, the defendant had "the right to repudiate the contract, and pay whatever damages" the plaintiff had sustained by having his performance checked at that stage of its progress. Obviously a de-

cision relative to the amount of damages recoverable for the breach of an executory contract for the sale of personal property would not necessarily be authority upon the measure of damages to be awarded in lieu of specific performance in an action for the exchange or sale of real property. In fact our statutes fix a different measure of damages for the breach of a contract for the sale of personal property, from that fixed for the breach of a contract for the sale of real property. Nor are the courts by any means agreed that the same measure of damages applies in all cases wherein the vendor fails or refuses to convey real property. Some courts make a distinction between those cases wherein the vendor enters into the contract in good faith but is unable to convey by reason of some defect unknown to him at the time the contract was made, and those cases wherein the vendor acts in bad faith by failing or refusing to convey, or disables himself from conveying. See 39 Cyc. 2106 et seq.

It is unnecessary for us, however, in this case to consider which of these rules (if either) should prevail in this state. We are not dealing here with a case for damages for breach of a contract to convey real property, but with a case wherein plaintiff has elected to require defendant to perform his contract, and invoked the aid of equity to compel such performance. Nor are we dealing with a case wherein the defendant, in good faith, has entered into a contract but finds himself unable to convey on account of some defect unknown to him at the time the contract was made. The defendant in this case does not contend that any such condition exists. It is undisputed that he became the owner of the premises, and at the time of contracting represented himself to the plaintiff to be such owner. The defendant has at no time indicated any inability on his part to convey. It is not contended that defendant is unable to comply with the decree directing him to perform his contract. On the contrary, the record in this case shows that defendant is able to make such performance. In view of these facts it is difficult to see how defendant is in position to complain of the amount of damages fixed in the alternative judgment, or the method adopted by the court in computing such damages. The defendant, by complying with the court's decree and performing his contract, will be fully relieved from any possible liability to pay such judgment.

The practice of rendering an alternative judgment for damages in

an action for specific performance of a contract to convey real property has been approved by this court. See *Mitchell v. Knudtson* Land Co. 19 N. D. 736, 124 N. W. 946. And the power of the court, in the same action, to decree specific performance, and also to award damages to compensate the plaintiff for the injury sustained by reason of a vendor's delay in conveying, is generally recognized and has received the sanction of this court. 26 Am. & Eng. Enc. Law, 86; 36 Cyc. 753; *Pillsbury v. J. B. Streeter, Jr.* Co. 15 N. D. 182, 107 N. W. 40; *Beddow v. Flage*, 22 N. D. 54, 132 N. W. 637.

In considering the allowance of such damages in *Pillsbury v. J. B. Streeter, Jr.* Co. *supra*, this court said: "The object to be aimed at by courts of equity in such cases is to place the party without fault as nearly as possible in the same condition as he would have been in had there been no default by the other party. Pom. Spec. Perf. §§ 429, 430; *Worrall v. Munn*, 38 N. Y. 137; *Bostwick v. Beach*, 103 N. Y. 414, 9 N. E. 41. The defendant, having enjoyed the fruits of possession, cannot justly claim that it was unjustly prejudiced by the judgment compelling the payment of interest on the money withheld without legal cause."

In this case the evidence shows that the plaintiff owned a stock of merchandise of an invoice value of \$4,245. The defendant was to select goods from this stock to the amount of \$3,144 according to invoice prices. The plaintiff offered no evidence tending to show the actual value, but defendant's counsel went into this matter fully, and over objection elicited evidence to the effect that the amount of stock to which defendant was entitled was actually worth from \$1,500 to \$1,900 at the time the contract was made, and had depreciated in value about \$400 between that date and the date of trial.

In order to be in a position to obtain specific performance of the contract, it was essential that plaintiff keep the entire stock of goods intact, so as to enable defendant to select the required portion therefrom. Plaintiff has kept the entire stock intact and inactive. The defendant has retained and enjoyed the benefit and profit of the real estate, and placed upon plaintiff the burden of keeping the purchase price, *viz.*, the stock of goods to be exchanged for the land, intact and inactive. If defendant is permitted to avail himself of the alternative provision of the judgment by paying damages, the plaintiff will lose

not only the depreciation in value in the stock of goods, but will also lose the interest on the capital thus invested. While we are unable to determine the basis on which the trial court fixed the amount of damages, we are wholly satisfied that defendant has no cause for complaint. The error, if any, in fixing damages was in favor of the defendant. This is true both as to the alternative judgment itself, and the amount thereof.

(5) What has been said above refers to the first cause of action. On the second cause of action the court awarded judgment for \$198, with interest from the date of trial. Appellant contends that this is erroneous for substantially the same reasons urged against the alternative judgment for damages, and what we have said in the preceding paragraph with respect thereto applies here. The plaintiff is entitled to be compensated for the damages sustained by reason of defendant's default. But while it is true that such damages may be recovered, it is also true that a foundation for such recovery must be laid in the complaint. Ordinarily damages cannot be awarded in an amount exceeding that alleged and demanded in the complaint. If larger damages are sought, they should be brought in by amendment, or, in a proper case, by a supplemental pleading. See 31 Cyc. 440 et seq., 499 D, 2; 1 Enc. Pl. & Pr. 588 et seq.

In this case plaintiff saw fit to set up the value of the storage charges for the goods as a separate cause of action. He alleged in his complaint that the amount of such storage charges was \$65, and demanded judgment for that amount. No amended or supplemental complaint was served or filed, nor was any amendment requested or allowed upon the trial. And there is nothing in the record to indicate that plaintiff expected or demanded judgment for a larger sum than \$65. The defendant was entirely justified in believing that this was the maximum amount which would be awarded against him upon the second cause of action. We are also satisfied that the evidence does not warrant a judgment in the amount awarded upon the second cause of action, but does warrant a judgment for the amount demanded in the complaint.

We reach the conclusion, therefore, that the judgment rendered upon the first cause of action should be affirmed, but that the judgment upon the second cause of action should be reduced to \$65 with interest. The

district court will modify its judgment accordingly, and as thus modified the judgment is affirmed. No costs shall be taxed to either party on this appeal.

H. C. AAMOTH v. GEO. A. HUNTER.

(157 N. W. 299.)

Promissory note—suit on—purchaser in due course—before maturity—without notice—defenses—maker—answer of—proof of—non-negotiable—when executed and delivered—materially altered—after delivery.

1. In a suit on a promissory note by a purchaser in due course before maturity and without notice of any defenses, the maker may answer and thereunder offer proof to establish that when executed and delivered the note was non-negotiable and contained no words of negotiability, but that it had been materially altered by their insertion after delivery and before its purchase; and that this alteration was made by the erasure of a line striking out all words of negotiability.

Note—payee named—“the order of”—omitted—words of negotiability—similar import—not contained—non-negotiable.

2. An instrument payable to a person named, omitting “the order of,” or words of negotiability of similar import, is non-negotiable under the uniform negotiable instruments act, as declared by § 6893, Comp. Laws 1913.

Opinion filed March 13, 1916.

Appeal from the District Court of Steele County, *Pollock, J.*, awarding judgment for plaintiff.

Reversed and new trial granted.

P. O. Sathre and *A. V. A. Peterson*, for appellant.

“To constitute notice of an infirmity in the instrument, or defect in the title of the person negotiating same, the person to whom it is negotiated must have had actual knowledge of such infirmity or defect, or knowledge of such facts that his action in taking the instrument amounted to bad faith.” Comp. Laws 1913, § 6358; *American Nat. Bank v. Lundy*, 21 N. D. 173, 129 N. W. 99; *First Nat. Bank v. Flath*,

10 N. D. 231, 86 N. W. 867; *Bothell v. Schweitzer*, 84 Neb. 271, 22 L.R.A.(N.S.) 263, 133 Am. St. Rep. 623, 120 N. W. 1129.

Without words of negotiability, purchasers take the bill or note subject to all defenses which were available between the original parties; and if it was non-negotiable as against the original party, it will not be rendered negotiable by subsequent transfer in negotiable form. 7 Cyc. 608, 609; Comp. Laws 1913, § 6886.

"The instrument is payable to order where it is drawn payable to the order of a specified person, or to him or his order." Rev. Code 1905, § 6310, Comp. Laws 1913, § 6893; *Wettlaufer v. Baxter*, 137 Ky. 362, 26 L.R.A.(N.S.) 804, 125 S. W. 741; 7 Cyc. 606; *Westberg v. Chicago Lumber & Coal Co.* 117 Wis. 589, 94 N. W. 572; *Mehlberg v. Tisher*, 24 Wis. 607; *Schierl v. Baumel*, 75 Wis. 69, 43 N. W. 724; *Gilley v. Harrell*, 118 Tenn. 115, 101 S. W. 424; *Searles v. Seipp*, 6 S. D. 472, 61 N. W. 804.

Where a note is executed and at the same time and as a part of the same transaction an agreement is entered into in writing on a separate paper, but attached to the note, in which the note is specially mentioned, conditioned for the happening of some future event, which, failing to come to pass, would render the note null and void, the whole is one transaction, and the validity of the note depends upon the condition, and is not a negotiable instrument. Comp. Laws 1913, § 6886, subdiv. 2 and 3; 7 Cyc. 628-631; *Bothell v. Schweitzer*, *supra*; *Palmer v. Largent*, 5 Neb. 223, 25 Am. Rep. 479.

The payee named in the note when executed and delivered was thereafter changed. This was a material alteration. Comp. Laws 1913, §§ 5940, 7009, 7010; 2 Cyc. 212.

If the note was originally non-negotiable, the defendant, as a matter of law, had the right to prove this fact. 2 Dan. Neg. Inst. p. 1579; *First Nat. Bank v. Laughlin*, 4 N. D. 397, 61 N. W. 473; *Bruce v. Westcott*, 3 Barb. 374; *Goodman v. Eastman*, 4 N. H. 455; *Sentance v. Poole*, 3 Car. & P. 1.

Lee Combs and *L. S. B. Ritchie*, for respondent.

It is clearly established that plaintiff took the note as an innocent purchaser for value. The defendant was not entitled to prove or attempt to prove the fraudulent character of the transaction out of which

the note grew, without first showing bad faith on the part of plaintiff. *American Nat. Bank v. Lundy*, 21 N. D. 167, 129 N. W. 99.

"An instrument is payable to order where it is drawn to the order of a specified person, or to him or his order." Compiled Laws 1913, § 6893.

"A certificate of deposit reciting that F. had deposited \$3,000 in the defendant company to the credit of himself is negotiable."

Likewise, a note payable to a specified person is negotiable without the words, "order of" or "to order" of "Bearer." *Forrest v. Safety Bkg. & T. Co.* 174 Fed. 345.

One who signs a note written partly in ink, but containing a material condition qualifying his liability written in pencil, is guilty of gross carelessness. If the writing in pencil is erased so as to leave no trace or indication of alteration, an innocent person taking the note before maturity, for value, will take it discharged of any defense arising from the erasure or from the fact of alteration. *Harvey v. Smith*, 55 Ill. 224; *Seibel v. Vaughan*, 69 Ill. 257; *Elliott v. Levings*, 54 Ill. 213; *Cornell v. Nebeker*, 58 Ind. 425; *Woollen v. Ulrich*, 64 Ind. 120; *Noll v. Smith*, 64 Ind. 511, 31 Am. Rep. 131; *Zimmerman v. Rote*, 75 Pa. 188; *Brown v. Rud*, 79 Pa. 370, 21 Am. Rep. 75; *Garrard v. Haddan*, 67 Pa. 82, 5 Am. Rep. 412; *Rainbolt v. Eddy*, 11 Am. Rep. 152, and notes, 34 Iowa, 440; *Yocum v. Smith*, 63 Ill. 321, 14 Am. Rep. 120; *Mater v. American Nat. Bank*, 8 Colo. App. 325, 46 Pac. 221; *Woollen v. Whitacre*, 73 Ind. 198; *Elliott v. Levings*, 54 Ill. 213; *Weidman v. Symes*, 120 Mich. 657, 77 Am. St. Rep. 603, 79 N. W. 894; *National Exch. Bank v. Lester*, 194 N. Y. 461, 21 L.R.A. (N.S.) 402, 87 N. E. 779, 16 Ann. Cas. 770; 8 Cyc. 30.

Changing the payee from "Beeson & Foley" to "H. A. Beeson" is not a material alteration, even if made. *Arnold v. James*, 2 R. I. 345.

Goss, J. Action at law upon a promissory note, alleging its purchase by plaintiff in due course for a valuable consideration and without notice of defenses. The answer admits the genuineness of the signature of defendant upon the note, but by way of defense alleges that when given the same was payable to "Beeson & Foley," and not as the note now appears payable "to the order of H. A. Beeson." "That defendant refused to sign said note until the words, 'the order of,' im-

mediately preceding the name 'Beeson & Foley,' were stricken out, and that before defendant did sign said alleged note the said words 'the order of' were stricken out." "That after the execution and delivery of said alleged note the said H. A. Beeson fraudulently, and to the prejudice of this defendant and without the knowledge and consent of this defendant, materially altered the said alleged note in this,—that he erased the line drawn through the words, 'to the order of,' and struck out the words, '& Foley,' and inserted the initials 'H. A.' before the name 'Beeson,' and that the said Beeson tore off and detached from said alleged note the said agreement in writing (upon which the answer sets forth a defense of failure of consideration) which was attached to and made a part of said alleged note."

Plaintiff proved that he had purchased the note in due course for valuable consideration before maturity. The promissory note is in the usual form, in part: "October 1, 1912, after date without grace I promise to pay to the order of H. A. Beeson \$800." In different colored ink from that in which the note was originally written and signed, the initials "H. A." are inserted above and to the left of the word "Beeson," and the words "& Foley" are stricken out. A close inspection of the note shows that the words, "the order of," in front of the printed word "Beeson" (the original printed form of the note running to Beeson & Foley printed therein as payee), had been at some time stricken out by a line, probably in pencil, drawn through them. Upon the introduction of the note in evidence in its present form plaintiff rested. Defendant then attempted to prove the averments of his answer, and that the note when signed and delivered had the words of negotiability, "the order of," stricken out and that the note as delivered ran to Beeson & Foley as payees, and, subsequent to its delivery and evidently before negotiation to plaintiff, had been materially altered by the erasure of the line, striking out the words of negotiability and the words "& Foley" and the interlineation of the initials "H. A." in front of "Beeson." The note is indorsed "H. A. Beeson." Evidence tending to establish failure of consideration was also offered. All proof of non-negotiability, material alteration, and failure of consideration, was excluded and a verdict directed in plaintiff's favor. The memorandum opinion of the court, reciting the reason for such exclusion, shows that the learned trial court, in so doing and in the application of authority, assumed that

the note had *at all times been negotiable*, and that the defenses offered were sought to be interposed as against a bona fide holder of *negotiable* commercial paper purchased before maturity. The fact of the non-negotiability of the note as executed and delivered apparently was wholly overlooked, or else § 6893, Comp. Laws 1913 (§ 27 of the original uniform negotiable instruments act), was misconstrued to hold that a negotiable instrument is payable to order when payable to an individual named and without words of negotiability. Section 6893 reads: "The instrument is payable to order where it is drawn payable to the order of a specified person or to him or his order." The trial court may have agreed with the contention of respondent's counsel that this provision should be construed as payable to order when "it is drawn payable to the order of a specified person or to him." The proper construction and interpretation of this provision of the uniform negotiable instruments law is that the instrument is payable to order where it is drawn payable (1) to the order of a specified person, or (2) *to him or his order*. The provision cannot be read as though a comma had been inserted after the word "him," or that the last three words, "or his order," did not supplement the preceding words, "to him." In commenting on this statute Crawford's annotated negotiable instruments law, under § 27, has the following: "By the rules of the law merchant an instrument payable to a specified person without the addition of the word 'order' or other word of similar import was not negotiable. . . . The English bills of exchange act provides that 'a bill is payable to order which is expressed to be so payable or which is expressed to be payable to a particular person, and does not contain words prohibiting transfer, or indicating an intention that it should not be transferred.' But this change in the law was not deemed advantageous, and was not adopted," in the uniform negotiable instruments act. "A note not containing the words to order or bearer or their equivalent is not negotiable under the provisions of the negotiable instruments law," meaning the uniform negotiable instruments law. *Wettlaufer v. Baxter*, 137 Ky. 362, 26 L.R.A.(N.S.) 804, 125 S. W. 741, passing upon the identical language of § 6893, Comp. Laws 1913, and kindred sections. To the same effect, see *Zander v. New York Security & T. Co.* 39 Misc. 98, 78 N. Y. Supp. 900. "An instrument to be negotiable 'must be payable to order or to bearer,' and in this respect

[the negotiable instruments law] is merely declaratory of the law of negotiable paper as it existed before the passage of the statute." Re-averred again in the syllabus of *Fulton v. Varney*, 117 App. Div. 572, 102 N. Y. Supp. 608. See also *Johnson v. Lassiter*, 155 N. C. 47, 71 S. E. 23, quoting and following the leading case of *Wettlaufer v. Baxter*, *supra*. The defense offered was in substance proof establishing that the purported negotiable instrument was non-negotiable when delivered. "And if it was originally non-negotiable as against the original parties it will not be rendered negotiable by subsequent transfer in negotiable form." *Wettlaufer v. Baxter*, 26 L.R.A.(N.S.) at page 806, citing authority. *Dan. Neg. Inst.* § 105; *Gilley v. Harrell*, 118 Tenn. 115, 101 S. W. 424. And if the instrument under the proof offered was non-negotiable when delivered, it remained so as between the payor and an indorsee. The trial court was in error in applying other portions of the negotiable instruments act governing the rights of parties, had the instrument in the first instance been negotiable. Consequently, decisions such as *American Nat. Bank v. Lundy*, 21 N. D. 167, 129 N. W. 99, are inapplicable. "Where the effect of such addition [the words 'or order' or 'bearer'] is to impart negotiability to an instrument not designed to be negotiable, it is a most material alteration in the nature of the contract, and the bill or note is thereby avoided." *Daniel on Negotiable Instruments*, 6th ed. § 1395, citing much authority, among which is *First Nat. Bank v. Laughlin*, 4 N. D. 391, 61 N. W. 473. It is elementary that a non-negotiable instrument is subject to all defenses in the hands of an assignee that could have been interposed by the party bound as against the original payee. Hence it was error to exclude the defenses offered. The judgment appealed from is reversed and a new trial granted.

M. C. FREERKS v. HERMAN NURNBERG.

(157 N. W. 119.)

Quantum meruit — action to recover on — attorney — professional services — answer — allegations — defenses — special contract — terms of — contingent fee — recovery — pleadings — portions of — stricken out — prejudicial error.

1. In an action by an attorney at law to recover on the *quantum meruit*

for professional services rendered to the defendant at his request, the answer, among other defenses, alleged that a portion of such services was performed under a special contract by the terms of which plaintiff agreed to commence and to prosecute at his own cost and expense certain actions for the defendant upon a contingent fee basis, and that, in the event he should be unsuccessful, he should receive no compensation for his services. It was also alleged that he was unsuccessful in such litigation. At the trial such defense was, on plaintiff's motion, stricken from the answer, and proof of the matters thus pleaded was offered and rejected. *Held*, that such rulings constituted prejudicial error.

Law appeals — supreme court — sits merely to review — evidence — sufficiency of — ruling of court — challenging — directed verdict — motion for — new trial.

2. Following *Morris v. Minneapolis, St. P. & S. Ste. M. R. Co.* 32 N. D. 366. *Held*, that the supreme court, in law appeals, sits merely in review of errors, and where no ruling of the trial court as to the sufficiency of the evidence is invoked, either by motion for a directed verdict or for a new trial, there is nothing for this court to review.

Pleadings — defects in — readily remedied — challenged first on appeal — not considered.

3. Defects in pleadings which are readily remedied will not be considered for the first time in the supreme court.

Opinion filed February 25, 1916. Rehearing denied March 24, 1916.

Appeal from the County Court of Stutsman County, *Hon. John U. Hemmi*, J. From a judgment in plaintiff's favor, defendant appeals. Reversed and a new trial ordered.

John A. Jorgenson and *C. S. Buck* (*W. H. Padden* and *Geo. H. Stillman*, of counsel) for appellant.

The special contract claimed by the defendant, whereby plaintiff was to take, and did take defendant's litigation shown in the record on a contingent fee basis, was not and is not champertous, but was and is a valid contract for professional services. *Sedgwick v. Stanton*, 14 N. Y. 289; *Huber v. Johnson*, 68 Minn. 74, 64 Am. St. Rep. 456, 70 N. W. 806; cases cited in 6 Cyc. 858, notes 38, and 39.

Note.—The right of an attorney to recover upon *quantum meruit* for services rendered under an illegal or champertous contract is discussed in notes in 2 L.R.A. (N.S.) 261, and 38 L.R.A. (N.S.) 202.

On when agreements with attorneys are void for champerty, see note in 27 Am. Rep. 319.

When a contract is *malum in se* a recovery can never be had, directly or indirectly.

It is said that a recovery may sometimes be had when an illegal transaction is involved. *White v. Franklin Bank*, 22 Pick. 181; *Stacy v. Foss*, 19 Me. 335, 36 Am. Dec. 755; *Morgan v. Beaumont*, 121 Mass. 7; *Thompson v. Williams*, 58 N. H. 248; *Brown v. Timmany*, 20 Ohio, 81; *Hentig v. Staniforth*, 5 Maule & S. 122, 17 Revised Rep. 293; *Skinner v. Henderson*, 10 Mo. 205; *Harse v. Pearl Life Assur. Co.* [1904] 1 K. B. 558, 3 B. R. C. 832, 72 L. J. K. B. N. S. 373, 52 Week. Rep. 457, 90 L. T. N. S. 245, 20 Times L. R. 264; *American Mut. L. Ins. Co. v. Bertram*, 163 Ind. 51, 64 L.R.A. 935, 70 N. E. 258; *Smith v. Blachley*, 188 Pa. 550, 68 Am. St. Rep. 887, 41 Atl. 619; *Congress & E. Spring Co. v. Knowlton*, 103 U. S. 49, 26 L. ed. 347, 57 N. Y. 518; *Lemon v. Grosskopf*, 22 Wis. 447, 99 Am. Dec. 58; *Smith v. Richmond*, 114 Ky. 303, 102 Am. St. Rep. 283, 70 S. W. 846; *Goodrich v. Houghton*, 134 N. Y. 115, 31 N. E. 516; *Wallis v. Portland*, 3 Ves. Jr. 494, 4 Revised Rep. 78, 8 Bro. P. C. 161.

If the contracts of contingent fee set up in the answer are champertous, they are illegal, and no recovery can be had upon the theory of *quantum meruit*. *Roller v. Murray*, 112 Va. 780, 38 L.R.A.(N.S.) 1202, 72 S. E. 665, Ann. Cas. 1913B, 1088.

The trial court erred in striking out of defendant's answer his two counterclaims as pleaded, the constituted valid defenses to plaintiff's cause of action. 9 Cyc. 741, note 49.

Under a general denial only, a special contract cannot be shown in an action on *quantum meruit*. *Register Printing Co. v. Willis*, 57 Minn. 93, 58 N. W. 825; *Stewart v. Thayer*, 170 Mass. 560, 49 N. E. 120.

In a suit for a balance due upon a mutual account, the gist of the action is the fact that a balance is due. Hence it is necessary to allege and prove in establishing plaintiff's cause of action both debts and credits, and that the balance has not been paid. *Pollak v. Winter*, 166 Ala. 255, 139 Am. St. Rep. 33, 52 So. 829, 53 So. 339.

Even in an ordinary suit for services performed, the complaint should allege nonpayment, and show that the services were not gratuitous. *Bacon v. Chapman*, 85 App. Div. 309, 82 N. Y. Supp. 545; *Hunt v. Osborn*, 40 Ind. App. 646, 82 N. E. 933; *Taggart v. Tevanny*, 1 Ind. App. 339, 27 N. E. 571; *Viley v. Pettit*, 96 Ky. 576, 29 S. W. 438.

The court's charge fails to cover the questions of preponderance of the evidence and burden of proof. 38 Cyc. 1691, 1748, notes 87-90.

The verdict of the jury is contradictory. It cannot find for plaintiff on his cause of action and for defendant on his counterclaims. "If the jury find specifically on the cause of action and the counterclaims, the verdict must clearly show in whose favor the balance rests and the amount thereof." *Kornegay v. Kornegay*, 109 N. C. 188, 13 S. E. 770; *Morrison v. Few*, 3 Tex. App. Civ. Cas. (Willson) 459.

Thorpe & Chase, for respondent, and *M. C. Freerks*, pro se.

If an illegal contract has been made, and when it is executed, the courts will not aid either party in any litigation in which it is necessary as a foundation of a claim or defense. But when the contract is executory the law always recognizes that a *locus penitentie* remains, and will aid the rights of a party who assumes a position in disaffirmance of the illegal transaction. *Congress & E. Spring Co. v. Knowlton*, 103 U. S. 49, 26 L. ed. 347.

When the defendant does not set up the defense of illegality, but such illegality appears from the case as made by either party, it becomes the duty of the court *sua sponte* to refuse to entertain the action. *Drinkall v. Movius State Bank*, 11 N. D. 10, 57 L.R.A. 341, 95 Am. St. Rep. 693, 88 N. W. 724; 15 Am. & Eng. Enc. Law, 1015; *Johnson v. Williard*, 83 Wis. 420, 53 N. W. 776.

No court will lend its assistance in any way towards carrying out the terms of an illegal contract. *Drinkall v. Movius State Bank*, 11 N. D. 13, 57 L.R.A. 341, 95 Am. St. Rep. 693, 88 N. W. 724; *Citizens' Nat. Bank v. Mitchell*, 24 Okla. 488, 103 Pac. 720, 20 Ann. Cas. 371; *Barngrover v. Pettigrew*, 128 Iowa, 533, 2 L.R.A.(N.S.) 260, 111 Am. St. Rep. 206, 104 N. W. 904; *Davis v. Webber*, 66 Ark. 190, 45 L.R.A. 196, 74 Am. St. Rep. 81, 49 S. W. 822; *Gammons v. Johnson*, 69 Minn. 488, 72 N. W. 563; *Potter v. Ajax Min. Co.* 22 Utah, 273, 61 Pac. 999; *Husbands v. Cook*, 24 Ky. L. Rep. 1320, 71 S. W. 508; *Stearns v. Felker*, 28 Wis. 594; *Thurston v. Percival*, 1 Pick. 415; *Rust v. Larue*, 4 Litt. (Ky.) 412, 14 Am. Dec. 172; *Lynde v. Lynde*, 64 N. J. Eq. 736, 58 L.R.A. 471, 97 Am. St. Rep. 692, 52 Atl. 694; *Brush v. Carbondale*, 229 Ill. 144, 82 N. E. 252, 11 Ann. Cas. 121; *Buck v. Eureka*, 124 Cal. 61, 56 Pac. 612; *McCurdy v. Dillon*, 135 Mich. 678, 98 N. W. 746; *Elliott v. McClelland*, 17

Ala. 206; *Goodman v. Walker*, 30 Ala. 482, 68 Am. Dec. 134; *Caldwell v. Shepherd*, 6 T. B. Mon. 389; *Papineau v. White*, 117 Ill. App. 51; *Re Snyder*, 190 N. Y. 66, 14 L.R.A.(N.S.) 1101, 123 Am. St. Rep. 533, 82 N. E. 742, 13 Ann. Cas. 441; 6 Cyc. 880, and cases cited; *Roller v. Murray*, 112 Va. 780, 38 L.R.A.(N.S.) 1202, 72 S. E. 665, Ann. Cas. 1913B, 1088.

Appellant cannot urge in the supreme court a theory of the case contrary to that upon which the case was tried, and submitted in the court below. *DeLaney v. Western Stock Co.* 19 N. D. 630, 125 N. W. 499.

Neither will a judgment be reversed on a theory not advanced and relied upon in the trial court. *McPherson v. Julius*, 17 S. D. 98, 95 N. W. 428; *Crisp v. State Bank*, 32 N. D. 263, 155 N. W. 78.

Trivial defects in a pleading which could not mislead should be disregarded where no objection is made before trial. *Ward v. Gardin*, 15 N. D. 649, 109 N. W. 57.

When the rules of pleading are ignored and no objection made, the pleadings will be taken for what they are worth on appeal. *Dal v. Fischer*, 20 S. D. 426, 107 N. W. 534.

"Objections to the technical sufficiency of a pleading are waived by proceeding to trial and judgment without objection." *McLain v. Nurnberg*, 16 N. D. 138, 112 N. W. 245.

And objections made for the first time in the supreme court come too late. *First Nat. Bank v. Warner*, 17 N. D. 76, 114 N. W. 1085, 17 Ann. Cas. 213.

FISK, Ch. J. This litigation arose in the county court of Stutsman county, and the appeal is from a judgment of that court in plaintiff's favor for the sum of \$295 and costs.

Plaintiff, a member of the bar of Stutsman county, sued to recover on various alleged causes of action for professional services rendered to the defendant at his request under an implied promise to pay the reasonable value thereof. All the allegations of the complaint are put in issue by the answer, and as to two of the plaintiff's principal causes of action the answer by way of an affirmative defense alleges that the services were performed by plaintiff under an express contract entered into through plaintiff's solicitation whereby he agreed to bring two cer-

tain actions for defendant,—one against Theodore Thom and the other against Grant Mercantile Company et al., and to carry on all proceedings with reference thereto on a contingent basis, agreeing to pay all costs and expenses connected therewith, and to receive one third of the amount collected after deducting costs and expenses, and turn over the balance to the defendant; and if plaintiff failed to collect anything from such parties, he was to stand all costs and disbursements, and was to receive nothing from defendant for his services in connection with such suits. Defendant further alleges that he consented to employ plaintiff upon the above conditions, and not otherwise, and that plaintiff failed to recover or collect anything in either of such suits; also that defendant was mulcted in costs and expenses in connection with such litigation in certain designated sums for which he has not been recompensed by plaintiff. Defendant also interposed counterclaims to recover for such costs and expenses. Numerous other counterclaims are interposed for smaller amounts, but which it is unnecessary to notice.

At the commencement of the trial, plaintiff moved that the defenses with reference to the special contracts and also the counterclaims for costs be stricken from the answer on the ground that the special contracts thus pleaded were champertous and void, and did not constitute a defense, nor could they form the basis of counterclaims. Defendant conceded that if such contracts were champertous, no recovery on the counterclaims could be had, but insisted that the contracts were properly pleaded as defensive matter. The motion to strike was granted, and later the court refused to admit proof of such contracts. Such rulings form the basis of appellant's chief assignment of error, and the only one requiring extended notice.

Plaintiff sought to recover upon the *quantum meruit* for these professional services, the greater portion of which was rendered, as defendant sought to plead and prove, under the special contracts aforesaid. Plaintiff having been successful in inducing the trial court to sustain his motion upon the grounds, as stated in his brief, "that such a contract, if made, would be champertous and illegal and contrary to public policy, it must be assumed on this appeal that such contracts were in fact entered into, and that defendant, if permitted to do so, could and would have shown that the services were performed by

plaintiff pursuant thereto. Plaintiff is in rather poor position to now assert that such contracts were merely executory and were in effect abandoned before the services were rendered. Nor, for like reasons, is he in a very favorable position to urge nonprejudice to appellant on account of such rulings. Nor is his contention of any force that because defendant, according to the allegations of his counterclaims, advanced certain costs which plaintiff agreed to advance, that this conclusively shows that the transaction was taken from without such illegal and champertous contracts. The defendant's theory as to this was merely that he advanced such costs and expenses as a mere loan under a promise that plaintiff would later pay him.

The question fairly presented, therefore, is whether proof that the services sued for were performed under such concededly illegal contract which was void as against public policy would defeat plaintiff's right to recovery for such services under a *quantum meruit*. Plaintiff concedes that if such a contract had been made with respect to promoting a divorce suit, or with respect to doing any other act which in and of itself contravened public policy, no recovery could be had for such services either on contract or *quantum meruit*, but he attempts to distinguish the case at bar upon the grounds, as we understand his argument, that the services contracted for were not in themselves illegal or in contravention of public policy, and that while the contract is void and cannot be enforced, the law permits a recovery on a *quantum meruit* for the reasonable value of the services. Citing: *Barngrover v. Pettigrew*, 128 Iowa, 533, 2 L.R.A.(N.S.) 260, 111 Am. St. Rep. 206, 104 N. W. 904; *Davis v. Webber*, 66 Ark. 190, 45 L.R.A. 196, 74 Am. St. Rep. 81, 49 S. W. 822; *Gammons v. Johnson*, 69 Minn. 488, 72 N. W. 563; *Potter v. Ajax Min. Co.* 22 Utah, 273, 61 Pac. 999; *Husbands v. Cook*, 24 Ky. L. Rep. 1320, 71 S. W. 508; *Stearns v. Felker*, 28 Wis. 594; *Thurston v. Percival*, 1 Pick. 415; *Rust v. Larue*, 4 Litt. (Ky.) 412, 14 Am. Dec. 172; *Lynde v. Lynde*, 64 N. J. Eq. 736, 58 L.R.A. 471, 97 Am. St. Rep. 692, 52 Atl. 694; *Brush v. Carbondale*, 229 Ill. 144, 82 N. E. 252, 11 Ann. Cas. 121.

Whether the distinction sought to be pointed out by plaintiff is sound, we, for reasons hereafter stated, need not determine. Concededly, there is some diversity in the holdings of the courts of the country upon that question. Counsel for appellant have, with much

skill and energy, classified and reviewed the authorities, and they show that many courts distinguish cases of champertous contracts where the champerty consists merely of an agreement containing a provision against the client settling the case without the attorney's consent, or contains a provision merely for a contingent fee, from those where the champerty consists of an agreement for a contingent fee and the payment by the attorney of the costs and expenses of the litigation. Counsel say that the difference is that in the former class of cases the services performed are legal, while in the latter they are in themselves illegal. They call attention to the recent case of *Greenleaf v. Minneapolis, St. P. & S. Ste. M. R. Co.* 30 N. D. 112, L.R.A. —, —, 151 N. W. 879, wherein a right of recovery on the contract was recognized where the contract of employment contained a stipulation against the client settling the case without the attorney's consent. For the information of the bar we here collect some of the many authorities cited in the appellant's brief and upon which counsel rely to support their contention that no recovery can be had on the *quantum meruit* for the alleged reason that the services performed were in themselves illegal on account of the champertous nature of the contract of employment. *Roller v. Murray*, 107 Va. 543, 59 S. E. 421, also, same case as reported in 112 Va. 780, 38 L.R.A.(N.S.) 1202, 72 S. E. 665, Ann. Cas. 1913B, 1088; *Gammons v. Gulbranson*, 78 Minn. 21, 80 N. W. 779; *Moreland v. Devenney*, 72 Kan. 471, 83 Pac. 1097; *Taylor v. Perkins*, 171 Mo. App. 246, 157 S. W. 122.

However, as before stated, it is unnecessary for us to decide such questions on this appeal, and we shall not do so. We are entirely clear that in any event it was prejudicial error to strike out such defenses, and we will briefly give our reasons for such conclusion. Under the terms of the special contracts as pleaded, plaintiff was to receive no compensation whatever unless he recovered in the actions, and in this he concededly failed. How then, in the light of this, can he be permitted to recover on the *quantum meruit*? In no case which has come to our notice has such a recovery been permitted where, as here, nothing would have been due under the special contract, if valid. The services performed by plaintiff were concededly of no actual value to defendant, therefore the rule of the cases relied on by respondent is of no avail to him. That the special contracts, although champertous

and void, were admissible to limit or defeat a recovery, is clear, for a recovery on *quantum meruit* cannot exceed the amount stipulated even in such void contracts. 6 Cyc. 880, and cases cited. As stated in 5 R. C. L. page 285: "The right of an attorney to recover the value of services rendered under a champertous contract is *limited to cases where the services themselves are valuable.*"

This disposes of the first assignment in appellant's favor, necessitating a new trial. In view of another trial we will briefly state our views as to the other assignments.

Assignment of error numbered 2 is without substantial merit. Even if it were necessary for plaintiff to allege nonpayment in his complaint, no such question appears to have been raised in the lower court. The defect in the pleading, if any, could have been readily remedied had it been properly challenged. The same is true of the objection that such complaint fails to allege that the services were rendered at the defendant's request. Such alleged defects will not be considered for the first time in this court.

Assignments 3, 4, and 5 have been considered, and we deem them not well taken.

The question as to the sufficiency of the evidence is argued at some length in the brief; but such question cannot be raised for the first time in the supreme court. This court, in law appeals, sits merely in review of errors, and where no ruling of the trial court as to the sufficiency of the evidence is invoked either by motion for a directed verdict or for a new trial, there is nothing for this court to review. *Morris v. Minneapolis, St. P. & S. Ste. M. R. Co.* 32 N. D. 366, 155 N. W. 861.

This disposes of all the assignments which are argued in the brief, and results in a reversal of the judgment and the remanding of the cause for a new trial. It is so ordered.

CHAS. JACKSON, a Minor, by L. M. Moore, His Guardian, *ad Litem* v. CITY OF JAMESTOWN, a Municipal Corporation.

(157 N. W. 475.)

Contributory negligence — trench or ditch — open — sidewalk — outside of — curb line.

1. It is *held* that under the facts of the case it was contributory negligence for the plaintiff to step backwards into an open trench or ditch which was some 1½ feet deep and 1 foot 4 inches wide, and which lay about a foot outside of the sidewalk, and just inside the curb line, and at the corner of a street.

Pedestrians — public streets — of city — must use sense — danger — must use his faculties — to avoid — municipal officers — presumption — duty — performance — obvious excavations — failure to notice.

2. A pedestrian upon the public streets of a city must use his senses, and not blindly walk or step backwards into a pit-fall, and, in walking upon such streets, he must make use of his faculties to discover danger and protect himself therefrom. He cannot rely so far on the presumption that the municipal authorities have done their duty and have kept the highway in a safe condition and in repair, as to go blindly forward without looking ahead and to take chances of getting along safely. His failure to notice obvious excavations in the sidewalk or at the edge thereof will be imputed to him as contributory negligence, unless his attention has been distracted in some other direction, not idly, but by some sufficient cause.

Pedestrian — attention — diverted — sufficient cause — excuse — contributory negligence.

3. The fact that a pedestrian's attention is diverted from an open and obvious danger will not excuse him from contributory negligence in stepping

Note.—The note referred to in the opinion in 21 L.R.A.(N.S.) 615, gives a full discussion of cases on the effect of contributory negligence and municipal liability for defects and obstructions in the highway, and for subsequent cases on this same subject, see note in 48 L.R.A.(N.S.) 629.

The effect of deviation from sidewalk or crossing by pedestrian is taken up in note in 17 L.R.A. 124.

On contributory negligence in the use of a street known to be out of repair, see note in 44 Am. Rep. 276.

When contributory negligence in the use of highway bars a recovery for injuries suffered is discussed in note in 47 Am. Rep. 744.

into the same, where such diversion of attention is self-induced and is caused by his talking to and joking with a friend.

Opinion filed March 30, 1916.

• Action to recover damages for personal injuries.

Appeal from the District Court of Stutsman County, *Coffey, J.*

Judgment for plaintiff. Defendant appeals.

Reversed and judgment directed for defendant.

O. J. Seiler and Thorp & Chase, for appellant.

It is not necessary that a question should be hypothetical in form when the opinion of the witness is based, not upon assumed facts, but upon his personal knowledge and observation. 2 Jones, Bluebook on Ev. § 375, and cases cited; Kinney v. Brotherhood of American Yeoman, 15 N. D. 21, 106 N. W. 44; Pyke v. Jamestown, 15 N. D. 157, 107 N. W. 359.

Evidence as to the tubercular condition of the plaintiff resulting from the injury was inadmissible because no foundation laid. Whart. & S. Med. Jur. §§ 546, 547; Briggs v. New York C. & H. R. R. Co. 177 N. Y. 59, 10 Am. St. Rep. 718, 69 N. E. 223, 15 Am. Neg. Rep. 396; Paty v. Martin, 15 La. Ann. 620; 17 Cyc. 212b, 226; Warsaw v. Fisher, 24 Ind. App. 46, 55 N. E. 42; Kelly v. Perrault, 5 Idaho, 221, 48 Pac. 45.

Where an answer to a proper question is conjectural and speculative, it should be stricken out. Swenson v. Brooklyn Heights R. Co. 15 Misc. 69, 36 N. Y. Supp. 445; Tozer v. New York C. & H. R. R. Co. 105 N. Y. 617, 11 N. E. 369; Fuller v. Jackson, 92 Mich. 197, 52 N. W. 1075; Kinney v. Brotherhood of American Yeoman, 15 N. D. 21, 106 N. W. 44.

The rule must be followed, for otherwise there is no basis upon which the jury can measure the value of the opinion. Pyke v. Jamestown, 15 N. D. 157, 107 N. W. 359; Bucher v. Wisconsin C. R. Co. 139 Wis. 597, 120 N. W. 518; Spear v. Hiles, 67 Wis. 361, 30 N. W. 511; Baxter v. Chicago & N. W. R. Co. 104 Wis. 307, 80 N. W. 644, 6 Am. Neg. Rep. 746; Jones v. Portland, 16 L.R.A. 437, note; Shaughnessy v. Holt, 236 Ill. 485, 21 L.R.A.(N.S.) 826, 86 N. E. 256; Gillett, Indirect & Collateral Ev. § 265; Fuhry v. Chicago City R. Co.

239 Ill. 548, 88 N. E. 221; *West Chicago Street R. Co. v. Carr*, 170 Ill. 478, 48 N. E. 992; *Kath v. Wisconsin C. R. Co.* 121 Wis. 503, 99 N. W. 217; *Greinke v. Chicago City R. Co.* 234 Ill. 564, 85 N. E. 327.

An opinion that an injury resulted from a certain designated act which is the one upon which the action is based, as distinguished from an opinion that certain causes would produce certain results, is improper as usurping the province of the jury. *Wharton & S. Med. Jur.* 3d ed. § 550, p. 580; 17 Cyc. 234-236; 2 Jones, *Bluebook on Ev.* § 372; *Jones v. Portland*, 88 Mich. 598, 16 L.R.A. 437, 50 N. W. 731; *Woodbury v. Obear*, 7 Gray, 467; *Hayes v. Smith*, 62 Ohio St. 161, 56 N. E. 879, 7 Am. Neg. Rep. 493; *Central City v. Marquis*, 75 Neb. 233, 106 N. W. 221; *Denver & R. G. R. Co. v. Vitello*, 34 Cal. 50, 81 Pac. 766; *State v. Stevens*, 16 S. D. 309, 92 N. W. 421; *Prentis v. Bates*, 88 Mich. 567, 50 N. W. 637; *Chicago v. Didier*, 227 Ill. 571, 81 N. E. 698.

"Speculative" means the formation of an opinion on defective or presumptive evidence; probable inference or surmise. *Michaud v. Grace Harbor Lumber Co.* 122 Mich. 305, 81 N. W. 93; *State v. Hanley*, 34 Minn. 430, 26 N. W. 397; *Hamilton v. Michigan C. R. Co.* 135 Mich. 95, 97 N. W. 392; *Davis v. Travelers' Ins. Co.* 59 Kan. 74, 52 Pac. 67; *Nichols v. Brabazon*, 94 Wis. 549, 69 N. W. 342.

"It is a well-settled principle of law that no evidence be permitted to go to the jury unless under oath, without expressed or implied consent." *Hawks v. Baker*, 6 Me. 72, 19 Am. Dec. 191; 40 Cyc. 2410; *Comp. Laws* 1913, § 7882; 1 *Thomp. Trials*, p. 365.

"A nurse may or may not be qualified to state an inference as to a medical matter, according to her training and experience and the subject of the inference." 17 Cyc. 205, also note 32 on same page.

"One who is not an expert may testify to the acts and appearance of another which indicate disease or inability, or to the contrary, but may not give an opinion on the subject." *Ashland v. Marlborough*, 99 Mass. 47; *Fallon v. Rapid City*, 17 S. D. 570, 97 N. W. 1009.

A cross-examination is proper though it calls for particular facts not called for on the direct examination, if they relate to the same subject-matter. *Campau v. Dewey*, 9 Mich. 381; *Ah Doon v. Smith*, 25 Or. 89, 34 Pac. 1093; *Sayres v. Allen*, 25 Or. 211, 35 Pac. 254;

3 Enc. Ev. 832; Abbott, Civil Jury Trials, pp. 220, 221; Hogen v. Klabo, 13 N. D. 319, 100 N. W. 847; 1 Thomp. Trials, 2d ed. § 408.

Where a subject is opened up on direct examination, on cross-examination such subject may be gone into fully and exhausted. Schnase v. Goetz, 18 N. D. 594, 120 N. W. 553.

"On cross-examination of a physician and surgeon as a witness, opposing counsel has the right to impeach his skill and test his competency." Schrandt v. Young, 62 Neb. 254, 86 N. W. 1085; 40 Cyc. 2480, subdiv. 2; Rodgers, Expert Testimony, p. 42, § 37, p. 83; State v. Kent, 5 N. D. 541, 35 L.R.A. 518, 67 N. W. 1052; Hogen v. Klabo, 13 N. D. 319, 100 N. W. 847; Abbott, Civil Jury Trials, pp. 220, 221; 1 Thomp. Trials, 2d ed. §§ 406, 408.

A penal ordinance requiring a citizen to do certain things in a certain manner does not create any liability in the event of its violation, unless the same state of facts created a liability at common law, and such ordinance is not evidence of negligence, and not admissible. Holwerson v. St. Louis & S. R. Co. 157 Mo. 216, 50 L.R.A. 850, 57 S. W. 770; Sanders v. Southern Electric R. Co. 147 Mo. 411, 48 S. W. 855; Byington v. St. Louis R. Co. 147 Mo. 673, 49 S. W. 876; note to Sullivan v. Huidekoper, 5 L.R.A.(N.S.) 266; Dolfinger v. Fishback, 12 Bush, 474; Gibson v. Leonard, 143 Ill. 182, 17 L.R.A. 589, 36 Am. St. Rep. 376, 32 N. E. 182; Stacy v. Knickerbocker Ice Co. 84 Wis. 614, 54 N. W. 1091, 1 Am. Neg. Cas. 738; Sowles v. Moore, 65 Vt. 322, 21 L.R.A. 723, 26 Atl. 629; Illinois C. R. Co. v. Phelps, 29 Ill. 447; Titcomb v. Fitchburg R. Co. 12 Allen, 254; Cook v. Johnston, 58 Mich. 437, 55 Am. Rep. 703, 25 N. W. 388; Inland Steel Co. v. Yedinak, 172 Ind. 423, 139 Am. St. Rep. 389, 87 N. E. 229; Gay v. Essex Electric Street R. Co. 159 Mass. 238, 21 L.R.A. 448, 38 Am. St. Rep. 415, 34 N. E. 186; Southern R. Co. v. Wood, 21 Ky. L. Rep. 575, 52 S. W. 796.

Evidence to show that the defect at the point of the accident was open to view; that other citizens in passing had noticed its conspicuous character and that it would necessarily be observed in passing, and to further show that the city would not anticipate an accident for the reason that a great many people had passed there without accident and without getting into the ditch. Butler v. Oxford, 186 N. Y. 444, 79 N. E. 712; Braatz v. Fargo, 19 N. D. 538, 27 L.R.A.(N.S.) 1169,

125 N. W. 1042; *Lane v. Hancock*, 142 N. Y. 510, 37 N. E. 473; *Hubbell v. Yonkers*, 104 N. Y. 434, 58 Am. Rep. 522, 10 N. E. 858; *Craighead v. Brooklyn City R. Co.* 123 N. Y. 391, 25 N. E. 387; *Bertelson v. Chicago, M. & St. P. R. Co.* 5 Dak. 313, 40 N. W. 531, 11 Am. Neg. Cas. 269; 29 Cyc. 623.

There can be no breach of duty by defendant when, in such a case, plaintiff himself does or omits to do the thing which, though in connection with defendant's misconduct, is likely to produce the harm. *Bigelow*, Torts, pp. 48, 49, 52, 179; *Owen v. Cook*, 9 N. D. 134, 47 L.R.A. 646, 81 N. W. 285; *Ætna F. Ins. Co. v. Boon*, 95 U. S. 117, 24 L. ed. 395; *Scherer v. Schlager*, 18 N. D. 421, 24 L.R.A.(N.S.) 520, 122 N. W. 1000; *Watson*, Personal Injuries, § 32, and cases cited; 29 Cyc. 528.

"The negligence of a person is not remote, although its inception was prior to that of defendant, where it is continued up to the time of the accident." 29 Cyc. 510, 511, 529; *Cunningham v. Lyness*, 22 Wis. 245; 5 *Thomp. Neg.* § 6237.

"The want of ordinary care on the part of the injured person occurs as a proximate cause in producing the injury; the defendant is not liable, although in fault. 1 *Thomp. Neg.* §§ 216, 227; *Heckman v. Evenson*, 7 N. D. 173, 73 N. W. 427.

One who has been about the place of the accident and knows its condition, or by the exercise of his sense and faculties could know and is presumed to know its condition, and by lack of observation or forgetfulness, or inattention to self-preservation from injury, sustains an injury, he cannot recover, unless it is shown that his attention was distracted on some sufficient cause. *Covington v. Manwaring*, 113 Ky. 592, 68 S. W. 625; *Sickels v. Philadelphia*, 209 Pa. 113, 58 Atl. 128; *Mitchell v. Tell City*, — Ind. App. —, 81 N. E. 594; 5 *Thomp. Neg.* §§ 6242, 6244; 28 Cyc. 1426; *Moeller v. Rugby*, 30 N. D. 438, 153 N. W. 290; *Lerner v. Philadelphia*, 221 Pa. 294, 21 L.R.A.(N.S.) 614, 70 Atl. 755; *Robb v. Connellsville*, 137 Pa. 42, 20 Atl. 564; *Whalen v. Citizens' Gaslight Co.* 151 N. W. 70, 45 N. E. 363, 1 Am. Neg. Rep. 120.

The plaintiff should have used due care and caution to have discovered the danger. *Munger v. Marshalltown*, 56 Iowa, 216, 9 N. W. 192; *McLaury v. McGregor*, 54 Iowa, 717, 7 N. W. 91; *Casey v. Malden*,

163 Mass. 507, 47 Am. St. Rep. 473, 40 N. E. 849; *Pierce v. Wilmington*, 2 Marv. (Del.) 306, 43 Atl. 162; *Carswell v. Wilmington*, 2 Marv. (Del.) 360, 43 Atl. 169; *Wilkins v. Wilmington*, 2 Marv. (Del.) 132, 42 Atl. 419; *Fallon v. Boston*, 3 Allen, 38; *Butterfield v. Forrester*, 11 East, 60, 10 Revised Rep. 433, 19 Eng. Rul. Cas. 189; *Weinstein v. Terre Haute*, 147 Ind. 556, 46 N. E. 1004, 2 Am. Neg. Rep. 331; *Plymouth v. Milner*, 117 Ind. 324, 20 N. E. 235; *Cressy v. Postville*, 59 Iowa, 62, 12 N. W. 757.

One cannot so act or place himself in danger by lack of due care and attention and then, if injured, recover damages. He must prudently protect himself, and, failing to do so, he is chargeable with negligence which will defeat a recovery. *Lautenbacher v. Philadelphia*, 217 Pa. 318, 66 Atl. 549; *Jackson v. Kansas City*, 106 Mo. App. 52, 79 S. W. 1174; *Sickels v. Philadelphia*, 209 Pa. 113, 58 Atl. 128; *Shallcross v. Philadelphia*, 187 Pa. 143, 40 Atl. 818; *Robb v. Connellsville*, 137 Pa. 42, 20 Atl. 564; 28 Cyc. 1426, and cases cited; *Yahn v. Ottumwa*, 60 Iowa, 429, 15 N. W. 257; *Hausmann v. Madison*, 85 Wis. 259, 21 L.R.A. 263, 39 Am. St. Rep. 834, 55 N. W. 167; *Benton v. Philadelphia*, 198 Pa. 396, 48 Atl. 267, 9 Am. Neg. Rep. 599; *Sindlinger v. Kansas City*, 126 Mo. 315, 26 L.R.A. 723, 28 S. W. 857; *Casey v. Malden*, 163 Mass. 507, 47 Am. St. Rep. 473, 40 N. E. 849; 29 Cyc. 513, 515, and cases cited; *Alline v. Le Mars*, 71 Iowa, 654, 33 N. W. 160; *O'Laughlin v. Dubuque*, 42 Iowa, 539; *Bigelow*, Torts, pp. 108, 112; *Americus v. Johnson*, 2 Ga. App. 378, 58 S. E. 518; *Bender v. Minden*, 124 Iowa, 685, 100 N. W. 352.

The presence of other parties with whom plaintiff was talking and joking is not a diverting cause. *Tuffree v. State Center*, 57 Iowa, 538, 11 N. W. 1; *Lechtenberger v. Meriden*, 91 Iowa, 45, 58 N. W. 1058, 100 Iowa, 221, 69 N. W. 424; *Stackhouse v. Vendig*, 166 Pa. 182, 31 Atl. 349; *Waterbury v. Chicago, M. & St. P. R. Co.* 104 Iowa, 32, 73 N. W. 341; *Munger v. Marshalltown*, 56 Iowa, 216, 9 N. W. 192; *Kewanee v. Depew*, 80 Ill. 119; *Moore v. Richmond*, 85 Va. 538, 8 S. E. 387.

The plaintiff's inadvertence here was self-induced. He was "visiting" and "talking" with friends. *King v. Colon Twp.* 125 Mich. 511, 84 N. W. 1077, 9 Am. Neg. Rep. 311; *Tuffree v. State Center*, 57

Iowa, 538, 11 N. W. 1; *Wheat v. St. Louis*, 179 Mo. 572, 64 L.R.A. 292, 78 S. W. 790; *Barnes v. Sowden*, 119 Pa. 53, 12 Atl. 804; 5 *Thomp. Neg.* § 6244; *Hutchins v. Priestly Exp. Wagon & Sleigh Co.* 61 Mich. 252, 28 N. W. 85; *Dale v. Webster County*, 76 Iowa, 370, 41 N. W. 1; *Stickney v. Salem*, 3 Allen, 374.

"Contributory negligence may be inferred from knowledge of the defects causing the injury, or its obviousness." 29 Cyc. 596, 600, 602, 604, and cases cited.

M. C. Freerks and Knauf & Knauf, for respondent.

Where a surgeon sworn to be duly qualified testifies fully as to the condition in which he found the limb, that had previously been amputated, he may properly be asked what, in his opinion was the cause of the condition in which he found the limb. *Tullis v. Rankin*, 6 N. D. 44, 35 L.R.A. 449, 66 Am. St. Rep. 586, 68 N. W. 187; *Wilson v. Northern P. R. Co.* 30 N. D. 456, L.R.A.1915E, 991, 153 N. W. 429.

Plaintiff was on the witness stand and was trying to indicate to the jury to what extent he could bend or flex the injured knee, and for the record, plaintiff's counsel placed his hand under the injured knee and pressed down on the toe, and stated what the jury themselves saw he was doing. Counsel's said statement is objected to on the ground that counsel was not under oath. Such statements in open court, and under such circumstances, are really under oath. *Anderson v. Minneapolis, St. P. & S. Ste. M. R. Co.* 18 N. D. 462, 123 N. W. 281; *Waldner v. Bowden State Bank*, 13 N. D. 604, 102 N. W. 169, 3 Ann. Cas. 847; *State v. Staber*, 20 N. D. 545, 129 N. W. 104.

In general, any failure of one engaged in his own business to comply with precautionary rules or regulations, established by competent authority, to guard against accidents to others, is in legal contemplation, a want of ordinary care. *Philadelphia, W. & B. R. Co. v. Kerr*, 25 Md. 521; *Norton v. Itner*, 56 Mo. 351; *Osborne v. McMasters*, 40 Minn. 103, 12 Am. St. Rep. 698, 41 N. W. 543.

In private actions for personal injuries, municipal ordinances and violations thereof are admitted in evidence upon the question of defendant's negligence, on the theory that the acts commanded or forbidden express an opinion of the municipal authorities that they are needful for, or inimical to, the safety of the public. But, if such

is not the manifest purpose, they do not express any opinion on the subject, and are inadmissible. *Shaffer v. Roesch*, 215 Pa. 287, 64 Atl. 511; *Stafford v. Chippewa Valley Electric R. Co.* 110 Wis. 331, 85 N. W. 1036; *Zimmerman v. Baur*, 11 Ind. App. 607, 39 N. E. 299.

The violation of a valid municipal ordinance or regulation made to protect persons and property from injury is of itself a sufficient proof of such breach of duty as will sustain a private action for negligence, if the other elements of actionable negligence concur. *Swift & Co. v. Fue*, 66 Ill. App. 651; *Omaha Street R. Co. v. Duvall*, 40 Neb. 29, 58 N. W. 531.

There is no assignment, specification, or point of error made in allegation of contributory negligence.

There is no compliance with either the statute or the rules of court. In any event, there was no contributory negligence, and the question was for the jury. *Heckman v. Evenson*, 7 N. D. 173, 73 N. W. 427.

One is to be judged in accordance with his age, intelligence, ability, and environment. *Umsted v. Colgate Farmers' Elevator Co.* 18 N. D. 324, 122 N. W. 390; *Heckman v. Evenson*, 7 N. D. 173, 73 N. W. 427.

A pedestrian on the street has the right to presume that the street is in a reasonably safe condition for travel by him, and he has a right to act on such presumption. This is the settled law. *Seward v. Wilmington*, 2 Marv. (Del.) 189, 42 Atl. 453; *Wilkins v. Wilmington*, 2 Marv. (Del.) 132, 42 Atl. 418; *Knight v. Kansas City*, 138 Mo. App. 153, 119 S. W. 992; *Lord v. Mobile*, 113 Ala. 360, 21 So. 366, 1 Am. Neg. Rep. 397; *Mickey v. Indianola*, — Iowa, —, 114 N. W. 1072.

In determining whether or not one is guilty of contributory negligence, his acts must be measured by what would be done by an ordinarily prudent person under the same circumstances, conditions, and surroundings. *Heckman v. Evenson*, *supra*; *Wilson v. Northern P. R. Co.* 30 N. D. 456, L.R.A.1915E, 991, 153 N. W. 429.

The evidence being such that different minds might reasonably draw different conclusions as to contributory negligence, it has ever been held that the question is for the jury. *Moeller v. Rugby*, 30 N. D. 450, 153 N. W. 290; *Teipel v. Hilsendegen*, 44 Mich. 461, 7 N. W. 82; *American Waterworks Co. v. Dougherty*, 37 Neb. 373, 55 N. W. 1051; *Leonard v. Minneapolis, St. P. & S. Ste. M. R. Co.* 63 Minn. 489, 65 N. W. 1084; *Crabell v. Wapello Coal Co.* 68 Iowa, 751, 28

N. W. 56; Gray v. Floersheim, 164 Pa. 508, 30 Atl. 397; Rober v. Northern P. R. Co. 25 N. D. 448, 142 N. W. 22, and cases cited; Pyke v. Jamestown, 15 N. D. 157, 107 N. W. 359; Kunkel v. Minneapolis, St. P. & S. Ste. M. R. Co. 18 N. D. 367, 121 N. W. 830.

Knowledge of the defect fails to constitute negligence. It is only evidence, and its worth, under the circumstances here, was a question for the jury to decide. Pyke v. Jamestown, 15 N. D. 157, 107 N. W. 359; Jackson v. Grand Forks, 24 N. D. 615, 45 L.R.A.(N.S.) 75, 140 N. W. 718, and cases cited.

BRUCE, J. This is an appeal from a judgment against the city of Jamestown for damages for injuries sustained by the plaintiff in falling into an open trench or ditch, some $1\frac{1}{2}$ feet deep and 1 foot 4 inches wide, which was constructed by the direction of the defendant and permitted by it to remain practically unprotected and immediately outside of the sidewalk, with possibly a space of a foot intervening, and just inside the curb line at the corner of Fourth and Front streets, and on the north side of said Front street in the city of Jamestown, North Dakota, the sidewalk at the place in question being some $12\frac{1}{2}$ feet wide, and the space between it and the curbing being about $3\frac{1}{2}$ feet.

There can be no question of the negligence of the city. There can, however, to our mind, be also no question as to the contributory negligence of the plaintiff, and therefore as to the fact that the trial court erred in not directing a verdict for the defendant. Numerous other errors are assigned by the appellant. The one mentioned, however, is conclusive of the case, and is the only one which is necessary to be considered. According to the plaintiff's own testimony he was twenty years of age. He had come to Jamestown for the purpose of getting work, and had worked for about five days prior to the accident in a livery stable. During these five days he had boarded at the Shain Hotel, which was situated on the same side of the street, on the same sidewalk, and about 30 feet east of the Stockholm Hotel, in front of which the accident occurred. During these five days the plaintiff passed along the sidewalk and within a few feet of the ditch while going to and from his work. The accident occurred at about 9:30 o'clock in the evening on the 14th day of August, 1914. Not only can the court take judicial notice that at that time of the year it is com-

paratively light in North Dakota at the hour mentioned, but the evidence shows that at the time of the accident the city lights were burning and that there was a light post about 30 feet from the place of the accident, and that the light was shining on to the sidewalk from the windows of the Stockholm Hotel, in front of which the accident occurred. The plaintiff, according to his testimony, had been visiting a friend during the early part of the evening, and returned to his hotel at about 9:30 o'clock in company with a companion named Fred Wertz. He testified that while on the way they were talking and joking about their visit. He crossed the street which runs north and south, and stopped upon the corner of the sidewalk with his companion.

His testimony as to what happened there is as follows:

Q. You mean you struck this building across the street west of the Stockholm?

A. Came across from the depot and followed right on down. Fred Wertz was with me.

Q. Fred was joshing you a little about the girl that night some. You were having quite a conversation standing on the corner?

A. Standing on the corner, yes, sir, he was joshing me about it. We were joshing one another all the time on the way down. We stopped to talk at the corner,—talking between ourselves. I was joshing with Fred Wertz. Mr. Wertz was standing with his back to the door (of the Stockholm Hotel) I was facing him. He was standing towards the door, and I was standing this way, and I was facing him with my back this way.

Q. You were near the ditch?

A. Yes, sir.

Q. Were you walking around there?

A. Not really walking,—stepping around.

Q. How did you happen to be stepping around?

A. Naturally do—you never stand still, do you?

Q. What were you stepping around about?

A. Do you suppose you would want to stand still talking.

Q. What were you stepping around about?

A. Was joshing, looking around. Joshing about the,—passing the time.

Q. Joshing about the girl and things like young fellows do?

A. Suppose that.

Q. That is right, laughing?

A. Some. Did not move around a great deal—just moving around. I was there I should judge about five minutes before I went into the hole, or before I fell into the ditch.

Q. Well, now what did you do? Were you looking at Fred all of this time?

A. Part of the time, never kept my eyes on the same place.

Q. Where were you looking?

A. Down and around.

Q. Down and around where?

A. At the building and sidewalk. Did not look behind.

Q. How were you looking around?

A. At Fred in front, the building there.

Q. What were you looking at?

A. A fellow was standing at the east side of the corner.

Q. Did you look around this way at all (indicating)?

A. No sir.

Q. The fact of the matter is, Charley, you did not look around this way?

A. No sir, not after I stopped.

Q. Do you know whether you did look this way or not?

A. Might have, would not swear to it. I was looking straight ahead when I was looking at the sidewalk there nearly all the time. When I fell into the ditch we were talking—standing there talking to each other. When we started this conversation I should judge I was about a foot or a foot and a half from the corner.

Q. In moving around doing your joshing, you got over towards the ditch?

A. Must have.

Q. While you were moving around on the sidewalk talking, you remember you never looked back of you any other way, do you?

A. No. Never once thought of the ditch being open that way. In fact I did not know the ditch was there.

Q. Did you observe the boards there before?

A. The boards?

Q. You saw these boards there before this night, did you not? You saw those boards along that sidewalk when you went down for a week before that night?

A. No sir, never noticed them. They might have been there.

Q. You saw those?

A. No, sir.

Q. How do you explain to the jury you never saw those things when you walked up and down there for a week?

A. The fact is I guess I never looked around in that direction. I went to the hotel when I went to get dinner and started back when I went to go to work.

Q. At the time the joshing was going on when you fell down there, was it not?

A. That is the time I fell into the hole—the first thing I noticed about to feel or anything was when I got into the hole.

Again, he says—A. Yes, sir, backed into it and fell on my right side.

“The law will not excuse a traveler in failing to make such use of his faculties as will enable him to discover plain and obvious dangers in the highway or sidewalk in front of him, but if he heedlessly casts himself upon a plain and obvious obstruction or into a plain and obvious excavation, he, and not the city, must suffer the consequences of his negligence and folly.” 5 Thomp. Neg. § 6242. “There is no rule or law that goes so far as to excuse the traveler from making such a use of his faculties to discover dangers and protect himself from them as prudent and careful travelers should make. He cannot rely so far on the presumption that the municipal authorities have done their duty and have kept the highway in repair, as to go blindly forward without looking ahead and taking the chances of getting along safely. His failure to notice large holes in the highway ahead of him will be imputed to him as contributory negligence, unless his attention has been distracted in some other direction, not idly, but by some sufficient cause.” 5 Thomp. Neg. § 6244; 28 Cyc. 1426; *Moeller v. Rugby*, 30 N. D. 438, 153 N. W. 290; *Lerner v. Philadelphia*, 221 Pa. 294, 70 Atl. 755, 21 L.R.A.(N.S.) 614, and note; *McLaury v. McGregor*, 54 Iowa, 717, 7 N. W. 91.

The authorities indeed are practically unanimous that a person must use his senses, and must not blindly walk into a pitfall. If it is negligence to shut one's eyes and to walk into such a defect, it is doubly so to back into it. *Casey v. Malden*, 163 Mass. 507, 47 Am. St. Rep. 473, 40 N. E. 849. If we apply these rules to the case at bar there can be no question of the contributory negligence of the plaintiff.

The sidewalk was only $12\frac{1}{2}$ feet broad. It is inconceivable that, in walking to and from his work, the plaintiff could not and did not see the ditch. When he stepped upon the sidewalk at the corner and on his way home, if he had used his eyes at all, he must have seen it. "What is the difference in result or in principle," says the supreme court of Michigan in the case of *King v. Colon Twp.* 125 Mich. 511, 84 N. W. 1077, 9 Am. Neg. Rep. 311, "between walking backward into a known and apparent danger and walking forward into the same danger without a thought or a look? What is the difference in result or in principle between walking forward into the same danger with one's eyes shut or open without looking." See also *Tuffree v. State Center*. 57 Iowa, 538, 11 N. W. 1; *Wheat v. St. Louis*, 179 Mo. 572, 64 L.R.A. 292, 78 S. W. 790; *Barnes v. Sowden*, 119 Pa. 53, 12 Atl. 804.

The plaintiff must or should have seen the ditch. The fact that he forgot about it while talking to his friend does not make him any the less negligent. Nor can the plaintiff take advantage of the rule of momentary diversion of attention. That rule only applies where one's attention has been diverted by an exterior and independent cause. The rule does not apply where the diversion is self-induced; and in the case at bar the diversion, if any, was induced not by exterior cause, but by the fact that plaintiff was, as he himself admits, "joshing" with his companion. *Bender v. Minden*, 124 Iowa, 685, 100 N. W. 352; *Tuffree v. State Center*, 57 Iowa, 538, 11 N. W. 1.

The judgment of the District Court is reversed and the cause is remanded, with directions to enter judgment for the defendant and to dismiss the complaint.

L. H. ELLIOTT and O. W. White v. JOHN CLEMANS and Louise Clemans.

(157 N. W. 822.)

Real estate mortgage—action to foreclose—material alterations—defense of—trial de novo—questions of fact—evidence.

Action to foreclose real estate mortgage. Defense: material alterations of the notes and mortgage; trial *de novo* in this court. The only question involved is whether the notes and mortgage in question were changed from \$800 to \$844.45, before or after their execution. The evidence is examined and held that the notes and mortgage in question had not been changed in any particular since their execution.

Opinion filed April 10, 1916.

Appeal from the District Court of LaMoure County, *Nichols, J.*
Affirmed.

M. C. Lasell and *S. E. Ellsworth*, for appellants.

When a showing is made by the opposite party to the effect that an intrinsic alteration is fraudulently made, the burden of sustaining it shifts to the party relying upon the altered instrument. *Cass County v. American Exch. State Bank*, 9 N. D. 263, 83 N. W. 12; *First Nat. Bank v. Laughlin*, 4 N. D. 391, 61 N. W. 473.

The certificate of a notary public has no greater sanctity in law than the unsupported oath of the notary who made it. "It may be contradicted or impeached by other competent evidence." 29 Cyc. 1094; *Nicholson v. Snyder*, 97 Md. 415, 55 Atl. 484; *Turner v. St. John*, 8 N. D. 245, 78 N. W. 340; *Baumer v. French*, 8 N. D. 319, 79 N. W. 340.

In such cases the rule that the proof must be "clear, strong, and convincing" has no application. *Riley v. Riley*, 9 N. D. 580, 84 N. W. 347.

Hutchinson & Lynch, for respondents.

Where it is claimed that a deed has been materially altered, the burden is on the party alleging such alteration, and his proofs must be clear, strong, and convincing. *Riley v. Riley*, supra.

33 N. D.—39.

The burden is upon the maker to show such alteration after execution and delivery. The proof or admission of the signature of a party to an instrument is *prima facie* evidence that the instrument written over the signature is his act, and will stand as binding proof until rebutted by evidence of the character stated. *Moddie v. Breiland*, 9 S. D. 506, 70 N. W. 637; *Arnold v. Brechtel*, 174 Mich. 147, 140 N. W. 610; *Kleeb v. Bard*, 12 Wash. 140, 40 Pac. 733.

The presumption of honesty is by no means so easily overcome that to say that a mere interlineation in a writing to correct an apparent mistake creates a fraudulent purpose or constitutes fraud. *Maldaner v. Smith*, 102 Wis. 30, 78 N. W. 140; *Wilson v. Hayes*, 40 Minn. 531, 4 L.R.A. 196, 12 Am. St. Rep. 754, 42 N. W. 467.

A certificate of acknowledgment of a deed or mortgage in proper form can be impeached only by clear, convincing, and satisfactory proof that it is false and fraudulent. *Banking house of A. Castetter v. Stewart*, 70 Neb. 815, 98 N. W. 34; *Linde v. Gudden*, 109 Wis. 326, 85 N. W. 323; *Bennett v. Edgar*, 46 Misc. 231, 93 N. Y. Supp. 203; *Barrett v. Davis*, 104 Mo. 549, 16 S. W. 377.

BURKE, J. Foreclosure of real estate mortgage. Defense, material alterations of the notes and mortgage. A trial anew is demanded in this court. Prior to March 15, 1904, the defendants, John and Louise Clemans, lived near Milford Center, Ohio. Upon said date they, with other colonists, moved to North Dakota, where they had purchased land from one C. C. Elliott. Part of the purchase price of the North Dakota farm is represented by the note and mortgage involved in this litigation, and the only question in dispute is whether said note and mortgage were changed from \$800 to \$844.45 before or after the same was signed. The evidence offered covers 198 pages of the statement of the case, and obviously cannot be reproduced in this opinion. The defendants admit signing the note and executing the mortgage, but both assert that the indebtedness was but \$800. Mrs. Clemans denies that she appeared before the notary public at the time and place certified. On the other hand, plaintiffs' witnesses tell a straightforward story, in every way reasonable and convincing.

As an example we quote from the testimony of the notary public:

Q. I hand you a paper marked exhibit "B." You may state what it is.

A. It is a mortgage.

Q. Executed by whom?

A. By John Clemans and Louise Clemans.

Q. You may state whether you ever saw that paper before.

A. I have.

Q. When and where?

A. Plain City.

Q. When?

A. The date here, March 5, 1904.

Q. You may state whether that paper was all written out when you got it first?

A. Well, to a certain extent. I had to fill in some here.

Q. What part did you fill in?

A. 44 and 45/100.

Q. Now, then, look at the note and state what you filled in the note.

A. Same amount,—\$44.45.

Q. You may state whether you filled in all that appears in black ink in the note and mortgage.

A. Yes, sir.

Q. You may state whether the mortgage and note, when they first came into your possession, were filled out with green ink?

A. Yes, sir.

Q. Why did you write the words, "forty-four and forty-five one-hundredths," in the mortgage and note?

A. By request.

Q. By whose request?

A. Why my recollection is—they had a conversation between Elliott and Mr. Clemans and that was to be written in and they sign the mortgage.

Q. At whose direction did you write the \$44.45 in?

A. With the consent of both of them.

Q. You may state whether you wrote the \$44.45 in the note and mortgage before it was signed?

A. Yes.

Q. Do you remember whether you read the mortgage and note to Mr. and Mrs. Clemans before they signed it?

A. I do not recollect. I cannot say.

Q. You may state whether Mr. and Mrs. Clemans looked them over before they signed them?

A. Well, they laid on the table there—before them and I stood back.

Q. Now, what conversation was it that occurred there between Mr. and Mrs. Clemans and C. C. Elliott about this \$44.45?

A. Well, they were talking there—I don't remember just what was said, but by their request I wrote this in.

Q. Were Mr. and Mrs. Clemans and C. C. Elliott all there present when they talked the matter over of writing the \$44.45 in the note and mortgage?

A. Yes, sir. They were all there in the room.

Q. You may state whether at the bottom of the mortgage the "Mch." and "5" are in your handwriting?

A. Yes, sir.

Q. And at the top the name "Louisa Clemens"?

A. Yes.

Q. You may state whether the acknowledgment to the mortgage is all in your handwriting?

A. Yes, sir.

C. C. Elliott's explanation of the change is that the \$800 represented a part of the purchase price of the land, while the \$44.45 was one half of the freight upon the railroad car to North Dakota; that he telephoned to the station agent to ascertain the amount, and had the notary make the change, as already testified to by him. To the same effect is the testimony of the two witnesses to the mortgage, as well as other witnesses who were present at the time the acknowledgment was taken. The only point upon which there is the slightest room for doubt is the presence of Mrs. Clemans before the notary upon the 5th of March. Her testimony is that she signed the mortgage at Milford Center on the 15th of March just before leaving for North Dakota. The corroboration of her statement consists of the testimony of the depot agent that

she borrowed pen and ink of him to sign some papers. He does not, of course, know that it was the note or mortgage in question that she signed. There is also testimony of some of her neighbors that she was at a certain farm house 13 miles from Plain City upon the 5th of March, 1904. As this testimony was given in 1912, over eight years after the incidents, we believe the probability of said witnesses remembering the exact date and month to be very meager. As already intimated, all of the corroborating testimony offered by defendant could very easily be true, and yet, with the change of a day's date, have not the slightest bearing upon the controversy before us. As we have seen, the other disinterested testimony all favors plaintiff's version, and in addition we have the circumstance that the change made in the note was in an entirely different colored ink. It is unreasonable to believe that a forger would use black ink to raise a green-ink note. It is also unreasonable to believe that the holder of an \$800 real estate mortgage would jeopardize the same by raising it in the paltry sum of \$44.45. Moreover, no claim of forgery was ever made until this suit, eight years after the execution of the note, although there is much evidence that defendant John Clemans had been repeatedly notified that the amount was \$844.45, and for said eight years the mortgage, stating the amount, was of record against his land. Of this much we feel absolutely certain,—the change in the note was made before it was signed by either of the defendants. Whether Mrs. Clemans signed it at Plain City on the 5th of March or at Milford Center on the 15th of March, she did so after the change had been made in the note, and with the intent to execute the papers and acknowledge them according to law. This finding of fact renders unnecessary a further discussion of this lawsuit. Judgment of the trial court is in all things affirmed.

E. H. HALVERSON v. M. C. LASELL.

(157 N. W. 682.)

Verdict—refusal to direct—close of plaintiff's case—motion for—by defendant—evidence after—by defendant—renewal of motion—must be—error.

1. Error cannot be predicated upon a refusal to direct a verdict at the

close of plaintiff's case, when testimony is thereafter offered by defendant, unless the motion is renewed at the close of all the testimony.

Jury — instructions of court.

2. Certain instructions to the jury considered and *held* nonprejudicial.

Instructions — correct as given — incomplete — more specific — more comprehensive — request for — must be made.

3. Where an instruction is correct as far as it goes, error cannot be assigned on the ground that it is not sufficiently full or explicit, unless request is made for more specific and comprehensive instruction.

Witness — questions — objections — sustained — error — curing — full testimony on same matters.

4. The error, if any, in sustaining objections to questions propounded to a witness is cured where the witness elsewhere in his testimony is permitted to testify fully upon the matters covered by such questions.

Opinion filed April 10, 1916.

From a judgment of the County Court of La Moure County, *Lynch, J.*, defendant appeals.

Affirmed.

S. E. Ellsworth, for appellant.

In conversion, if the act which deprived plaintiff of his goods was authorized by him, or was performed for his benefit or for the benefit of some third person, or was otherwise lawful on defendant's part, he cannot be held liable in trover without proof of an intent to convert the property to his own use. To constitute conversion there must be a positive tortious act. 38 Cyc. 2005, 2010; 8 Wait, Act. & Def. 1194; *Bolling v. Kirby*, 90 Ala. 215, 24 Am. St. Rep. 789, 7 So. 914; *Terry v. Birmingham Nat. Bank*, 30 Am. St. Rep. 87, and note, 93 Ala. 599, 9 So. 299; 2 Kinkad, Torts, § 582; *Tinker v. Morrill*, 39 Vt. 477, 94 Am. Dec. 345; *Magnin v. Dinsmore*, 70 N. Y. 417, 26 Am. Rep. 608; *Bigelow Co. v. Heintze*, 53 N. J. L. 69, 21 Atl. 109; *Taughner v. Northern P. R. Co.* 21 N. D. 111, 129 N. W. 747; *Citizens' Nat. Bank v. Osborne-McMillan Elevator Co.* 21 N. D. 335, 131 N. W. 266.

To constitute conversion, the assumption and exercise of the right of ownership must be in direct derogation, denial, and defiance of the rights of the owner. *Taughner v. Northern P. R. Co.* 21 N. D. 111, 129 N. W. 747; *Citizens' Nat. Bank v. Osborne-McMillan Elevator Co.* 21 N. D. 335, 131 N. W. 266.

An asportation of goods is not in itself a sufficient assertion of ownership to constitute conversion, unless prompted by an intent to deprive the owner either of his property or the possession thereof. 38 Cyc. 2010, 2018.

It is the province of the jury to pass upon the credibility of the witnesses, and they may disregard the testimony of a witness who has neither been impeached nor contradicted, if they believe his statements untrue, from his manner of testifying, his apparent bias and prejudice towards the opposite party, or from his interest in the litigation. *Houston, E. & W. T. R. Co. v. Runnels*, 92 Tex. 305, 47 S. W. 971; *Seekerson v. Sinclair*, 24 N. D. 625, 140 N. W. 239.

On the question of what constitutes conversion, the charge of the court is clearly incomplete and fails to fully define to the jury the elements necessary to constitute conversion, and leaves much for the jury to conjecture. It is the duty of the court to charge fully upon all material points of law, as an aid and enlightenment to the jury, upon the questions before them. *Putnam v. Prouty*, 24 N. D. 517, 140 N. W. 93; *Moline Plow Co. v. Gilbert*, 3 Dak. 239, 15 N. W. 1; *Forzen v. Hurd*, 20 N. D. 42, 126 N. W. 224.

Hutchinson & Lynch, for respondent.

Where a person exercises rights and authority over the property of another, in moving and putting alterations thereon without authority from the owner and not made for his benefit, such acts are presumed to be intended or immaterial. 38 Cyc. 2010, 2159, and 2081.

Where property is left by the owner in the possession of another for certain purposes, and such other person thereafter uses the property contrary thereto, and in a manner in defiance of the owner's rights, the original consent of the owner to possession merely will not avail him in an action for conversion resulting from his wrongful acts. 38 Cyc. 2074, 2107, 2109; *Bacon v. Hooker*, 173 Mass. 554, 54 N. E. 253; *Hahn v. Sleepy Eye Mill. Co.* 21 S. D. 324, 112 N. W. 843; *More v. Burger*, 15 N. D. 345, 107 N. W. 200.

CHRISTIANSON, J. In the year 1908, plaintiff entered into an arrangement with the defendant, whereby plaintiff was permitted to construct a dwelling house upon a plot of ground within the city of La Moure, owned by the defendant. Plaintiff thereafter constructed

the house and occupied the same as a dwelling until in the fall of 1910, when he removed to Morton county in this state. Prior to plaintiff's removal, some negotiations were had between him and one Mills for the sale of this house to Mills. A price was agreed upon, promissory notes were executed by Mills, and a bill of sale conveying title to the building was executed by the plaintiff. These papers, however, were not delivered, but were placed with the cashier of a bank at La Moure until such time as Mills furnished certain securities. The understanding at the time of the sale negotiations was that Mills should remove the house to another location as soon as he could. Mills failed to furnish the securities, and the papers were never delivered. On May 15, 1911, the defendant, Lasell, wrote plaintiff in part as follows: "Now Mills is unable to move the house he has no money, and can do nothing. I am already breaking upon this land, and will have to move the building myself, and shall move it upon a stone foundation upon my own property and retain it until the full satisfaction of all claims, unless I hear from you by return mail. The house is in my possession, I have the deed for it, and I am going to move it at once. I desire to hear from you, however, and get the matter straight so far as you are concerned if possible."

Whereupon the plaintiff sent the keys to the house to Mills by mail, and also wrote Mills the following letter: "As Lasell wrote me telling me to move the building, I will write and ask you to move it as he has all ready ordered it moved, as I am coming back as soon as I can get away."

After the receipt of this letter, Mills and Lasell had a conversation in which the moving of the house was discussed, and in which Mills informed Lasell that he did not have time to move the house if it had to be removed right away, and that he (Lasell) would either have to move it himself or get it done. During this conversation, Mills turned over to Lasell the letter which he had received from plaintiff, together with the keys to the house. Thereupon, in the latter part of May, 1911, defendant moved the house off his property and into the street adjacent thereto, where it remained until about May 30, 1912.

The proposed deal between plaintiff and Mills was never consummated, and some time in the latter part of September, 1911, the papers were destroyed and the deal terminated by mutual consent. Mills testi-

fied that he informed the defendant, Lasell, of this fact shortly thereafter. The defendant owned some lots in another part of the town site, and about May 30, 1912, he again moved the house and placed the same on these lots. He took out one end of the house and added to it materially, constructed a full basement under it, and in general made it into a modern dwelling house, apparently permanently located on a fixed and substantial foundation. Defendant thereupon rented the house to a tenant, and continued to receive rent from the tenant up to the time of the trial. There is no contention that defendant had any authority from anyone to alter or remodel the building, nor is there any claim that he received any authority to move the building the second time. In fact defendant rests his authority upon the permission received from Mills in May, 1911, and an alleged claim for leveling off and cleaning up the premises from whence the house was moved. Plaintiff instituted the present action for damages sustained by defendant's acts. The same came on for trial before a jury, and resulted in a verdict in plaintiff's favor. Judgment was entered pursuant to the verdict, and defendant has appealed from such judgment.

Plaintiff's complaint, as amended upon the trial, alleged:

"I. That on the 7th day of June, 1911, the plaintiff was the owner and lawfully possessed of the following described property:

"One frame house eighteen (18) feet by twenty-four (24) feet in size and one and one-half ($1\frac{1}{2}$) stories high, which upon said date was situated upon lots twenty-one (21) and twenty-two (22) in block fourteen (14) of the eastside addition to the city of La Moure, county of La Moure, and state of North Dakota, and which was worth and of the value of \$600.

"II. That on or about the 7th day of June, 1911, the defendant unlawfully took possession and moved away said house, moving it at that time upon one of the streets in the city of La Moure, and later and on or about the 30th day of May, 1912, said defendant moved said building upon his lots in block twenty-nine (29) of the original plat of the said city of La Moure, and converted said property to his own use to the damage of the plaintiff in the sum of \$600."

The defendant's answer, aside from a general denial, consisted of certain counterclaims, which are not material on this appeal. No error is assigned upon rulings with respect to the sufficiency of the pleadings.

(1) Appellant's first assignment of error assails the court's ruling "in denying the motion of defendant's counsel, made at the close of plaintiff's testimony, that the jury be directed to render its verdict against the plaintiff and in favor of the defendant." The record shows that after the denial of such motion defendant introduced considerable testimony in his defense, and that plaintiff introduced further testimony in rebuttal. The record also shows that the motion was not renewed at the close of all the evidence. Hence, under numerous decisions of this court, the error, if any, in the denial of defendant's motion for a directed verdict at the close of plaintiff's case in chief, was waived. See *Buchanan v. Occident Elevator Co.* ante, 346, 157 N. W. 122, and authorities therein cited.

(2) The next assignment of error is predicated upon alleged error in the court's instructions to the jury. The instructions assailed are as follows:

1. "I instruct you that conversion would be any unauthorized assumption and exercise of the right of ownership over the building in question by the defendant."

2. "The defendant is charged with taking the building and moving it to his own property in another section of the city, and I instruct you that such taking and moving by the defendant in law constitutes a conversion unless the moving and taking away were authorized by the plaintiff, or by a third party, either the rightful owner of the building, or one who claimed ownership under the plaintiff, and the plaintiff's situation and conduct were such that defendant was led to believe such third person to be the owner."

3. "Before you can find for the plaintiff on the question of conversion, you must be satisfied by a fair preponderance of the evidence that plaintiff was the rightful owner at the time of such conversion; and that defendant took and moved the said building without his authority expressly given."

4. "The source of claim of ownership by Mills cannot avail the defendant unless made under circumstances known and assented to by plaintiff. The plaintiff must have done something or omitted to have done something which caused the defendant to, in good faith, purchase said building from Mills, believing it to be the property of said Mills, and convert the same to his own use, if you find that he did purchase it.

By good faith I mean that defendant must have had no knowledge of any facts or circumstances which would have caused a reasonably prudent man to inquire into the same before acting."

The principal complaint made of these instructions is that they are deficient in character, and do not embody all the essential elements of a conversion. No request was made for additional instructions.

Bouvier (Bouvier's Law Dict.) defines conversion: "An unauthorized assumption and exercise of the right of ownership over goods or personal chattels belonging to another, to the alteration of their condition or the exclusion of the owner's rights."

Cooley (Cooley, Torts) says: "Any distinct act of dominion wrongfully exerted over one's property in denial of his right, or inconsistent with it, is a conversion." See also 21 Enc. Pl. & Pr. 1014.

The testimony is undisputed that Mills delivered the keys to the house to the defendant solely for the purpose of enabling defendant to have the house moved so that defendant could break the land on which the house was then situated. It is also undisputed that the deal between Mills and Halverson was never consummated, but that all papers between them were destroyed in the latter part of September, 1911. Defendant admits that some time thereafter he was informed of this fact, and that long prior to moving the house the second time he had knowledge of the fact that Halverson claimed to be the owner of the house, and that Mills had no interest therein. Possessed of this knowledge, the defendant went on and wilfully took the house and moved it upon his own lots, tore out one end, and constructed an addition thereto, and generally converted it into a different building.

Defendant testified in part upon the trial as follows:

Q. You directed the moving of it?

A. Yes, sir.

Q. And you set it there on a foundation, did you?

A. I caused it to be placed upon a foundation.

Q. You remodeled it did you?

A. I converted it into a house. . . .

Q. And you now claim the ownership of this building, do you?

A. I have it.

Q. Did you purchase it from Mr. Mills?

A. Yes; there was some debt for cleaning up around the premises which Mills and Halverson had agreed to pay, and Mills gave me the building.

Later on, however, in his testimony the defendant testified as follows:

Q. If you had any claim at all at the time, it was for this cleaning up you speak of around the building?

A. Yes. And the use of the property which he used belonging to me in 1910, the pasture and the use of the land upon which the house stood in 1910.

The defendant also testified:

Q. You took it and moved it twice?

A. I moved it twice.

Q. You now have placed it on your own lands and claim the house as your own?

A. It is still in my possession; yes, sir.

Q. And enlarged it and made a dwelling house out of it?

A. I am renting it now.

When the instructions assailed are considered in connection with all the instructions given and the evidence received upon the trial, defendant has no cause for complaint.

Error is also assigned upon the following instruction:

(5) "Now, gentlemen, you are the sole judges of the facts and of the credibility of the witnesses, the weight and value of the testimony. And you will give the evidence and witnesses such weight as you believe it is entitled to under the facts and circumstances of the case. And you have a right to consider the witnesses on the stand, their demeanor, and the means of knowing the facts to which they testify; their knowledge of the circumstances, the probability and the reasonableness of the statements that have been made by them; and it is your province to reconcile the testimony, and, if there are any conflicts in the testimony, you must reconcile them, if it is possible to do so. If not, you can believe or disbelieve any of the witnesses, as you may or may not think them entitled to credit; and if any find that any witness has wilfully

testified falsely as to any material matter in the case, then you are at liberty to hold and disregard or discredit all of their testimony or such parts as are not corroborated or sustained by other credible testimony."

It is asserted that the following statement is erroneous: "And it is your province to reconcile the testimony, and if there are any conflicts in the testimony you must reconcile them, if it is possible to do so." We do not approve of this instruction, but are not prepared to say that it is necessarily prejudicial.

"Even though the instruction complained of was not entirely perfect, this would not necessarily constitute reversible error, unless it further appears that the jury were misled thereby. For 'courts of error do not sit to decide moot questions, but to redress real grievances. It is therefore a rule of nearly all the courts that no judgment will be reversed on account of the giving of erroneous instructions, unless it appear probable that the jury were misled by them.' *Thomp. Trials*, § 2401." *McGregor v. Great Northern R. Co.* 31 N. D. 471, 154 N. W. 261.

Appellant has pointed out no way in which he could possibly have been prejudiced by the instruction; and in view of the testimony received upon the trial, we are satisfied that he was not prejudiced thereby, but that the instruction, if erroneous, was rather error in favor of the defendant than against him.

(3) Appellant also asserts that the instructions to the jury were defective because the court did not "properly define the action of conversion," and fully explain the conditions governing defendant's liability. A sufficient answer to this contention is that defendant made no request for such instruction. "Where an instruction is correct as far as it goes, error cannot be assigned on the ground that it was not sufficiently full or explicit, unless request is made for more specific and comprehensive instruction." See *McGregor v. Great Northern R. Co.* *supra*, and authorities therein cited.

(4) Error is also predicated upon the trial court's ruling in sustaining objections to certain questions propounded by defendant's counsel to the witness, Mills. The record discloses, however, that Mills elsewhere in his testimony testified fully upon the matters referred to in such questions. Hence, the rulings were not prejudicial. See 38 Cyc. 1460, 1462.

We find no error justifying a reversal of the judgment appealed from, and the same is affirmed.

C. O. HOUGLUM and Carl Houghlum, copartners as C. O. Houghlum & Son v. JOHN BROWKOWSKI

(157 N. W. 675.)

Action in claim and delivery. Plaintiff demands possession of enough grain to satisfy a thresher's lien. Appellant argues three groups of errors which we cannot sustain, for the reasons stated below:

Claim and delivery — action in — thresher's lien — errors — evidence — defendant — grain beyond control — admission of — admitted fact.

1. An examination of the evidence discloses that defendant admitted that the grain was beyond his control. It was therefore not error to exclude further evidence of this admitted fact.

Thresher's lien — evidence — offered in — exclusion — grain — unidentified.

2. It was not error to reject the thresher's lien when offered in evidence. The evidence disclosed that the grain in question could not be identified as having been grown upon the land covered by the lien.

Offer of proof — lien — erroneously drawn — intention.

3. It was not error to reject plaintiff's offer to show that the lien was not intentionally erroneously drawn.

Opinion filed April 10, 1916.

Appeal from the District Court of Williams County, *Frank E. Fisk, J.*

Affirmed.

H. W. Braatlien, for appellants.

In claim and delivery it is proper to show that the property cannot be produced. *Larson v. Hanson*, 21 N. D. 411, 131 N. W. 229, 26 N. D. 422, 51 L.R.A. (N.S.) 655, 144 N. W. 681; *Farmers' Nat. Bank v. Ferguson*, 28 N. D. 347, 48 N. W. 1049.

Certain grain covered by the lien was identified. The court erred in refusing to admit in evidence plaintiffs' lien statement, because it contained a reference to more grain than was raised on the land therein-described. *Dahlund v. Lorentzen*, 30 N. D. 275, 152 N. W. 684; *Howe v. Smith*, 6 N. D. 432, 71 N. W. 552; *Red River Lumber Co. v. Children of Israel*, 7 N. D. 46, 73 N. W. 203; *Turner v. St. John*, 8 N. D. 245, 78 N. W. 340; *Salzer Lumber Co. v. Clafin*, 16 N. D. 601, 113

N. W. 1036; *Robertson Lumber Co. v. Clarke*, 24 N. D. 134, 138 N. W. 984; *Mitchell v. Monarch Elevator Co.* 15 N. D. 500, 107 N. W. 1085, 11 Ann. Cas. 1001; *Tulloch v. Rogers*, 52 Minn. 114, 53 N. W. 1063; *Willamette Steam Mills v. Kremer*, 94 Cal. 205, 29 Pac. 633; *Seaton v. Hixon*, 35 Kan. 663, 12 Pac. 22; *Martin v. Simmons*, 11 Colo. 411, 18 Pac. 535; *Laird-Norton Co. v. Hopkins*, 6 S. D. 217, 60 N. W. 857; *Albright v. Smith*, 3 S. D. 632, 54 N. W. 816, 2 S. D. 577, 51 N. W. 590; *Pinkerton v. LeBeau*, 3 S. D. 440, 54 N. W. 97; *Tonopah v. Nevada Amusement Co.* 30 Nev. 445, 97 Pac. 637, and cases cited; *Rogers v. Omaha Hotel Co.* 4 Neb. 58; *Way v. Cameron*, 94 Neb. 708, 144 N. W. 172; *Welch v. McGrath*, 59 Iowa, 519, 10 N. W. 810, 13 N. W. 638; *Chaffee v. Edinger*, 29 N. D. 537, 151 N. W. 223; *Lavin v. Bradley*, 1 N. D. 291, 47 N. W. 384.

The construction put upon the lien is not so strict between the parties and where no third party interests are involved. *Harmon v. San Francisco & S. R. R. Co.* 86 Cal. 617, 25 Pac. 125; *Laird-Norton Co. v. Hopkins*, 6 S. D. 217, 60 N. W. 857; *Howe v. Smith*, 6 N. D. 432, 71 N. W. 552; *Tulloch v. Rogers*, 52 Minn. 114, 53 N. W. 1063; *Johnson v. Starrett*, 127 Minn. 138, L.R.A.1915B, 708, 149 N. W. 6.

The lien statement is notice, and, in addition, defendant had actual notice. *Howe v. Smith*, 6 N. D. 436, 71 N. W. 552; *Laird-Norton Co. v. Hopkins*, 6 S. D. 217, 60 N. W. 857; *Turner v. St. John*, 8 N. D. 245, 78 N. W. 340.

In mechanic's liens the mere fact that the amount stated is excessive will not defeat the lien. *Gibbs v. Hanchette*, 90 Mich. 657, 51 N. W. 691; *Howe v. Smith*, 6 N. D. 432, 71 N. W. 552; *Tulloch v. Rogers*, 52 Minn. 114, 53 N. W. 1063; *Willamette v. Kremer*, 94 Cal. 205, 29 Pac. 633; *Red River Lumber Co. v. Children of Israel*, 7 N. D. 46, 73 N. W. 203.

The claimant is not required before filing his lien claim to make an accurate survey of the lot upon which the building stands at the risk of losing his lien; if he makes a slight mistake in its boundaries, it is not fatal. *Willamette v. Kremer*, 94 Cal. 205, 29 Pac. 633; *Dahlund v. Lorentzen*, 30 N. D. 275, 152 N. W. 684; *Way v. Cameron*, 94 Neb. 708, 114 N. W. 172; *Salzer Lumber Co. v. Clafin*, 16 N. D. 607, 113 N. W. 1036; *Freeman v. Clark*, 28 N. D. 578, 149 N. W. 565; *Robertson Lumber Co. v. Clarke*, 24 N. D. 140, 138 N. W. 984; *Barnes v. Colo-*

rado Springs, C. C. Dist. R. Co. 42 Colo. 461, 94 Pac. 570; Gordon Hardware Co. v. San Francisco & S. R. R. Co. 86 Cal. 620, 25 Pac. 125; Allen v. Elwert, 29 Or. 428, 44 Pac. 823, 48 Pac. 54; Maynard v. Ivey, 21 Nev. 241, 29 Pac. 1090.

A lien filed in one county for work done in two counties is good as to the work done in the county where filed. Richmond & I. Constr. Co. v. Richmond, N. I. & B. R. Co. 34 L.R.A. 625, 15 C. C. A. 289, 31 U. S. App. 704, 68 Fed. 105; Gorthy v. Jarvis, 15 N. D. 509, 108 N. W. 39; Howe v. Smith, 6 N. D. 434, 71 N. W. 552.

There was no fatal variance between pleading and proof. Snell v. Payne, 115 Cal. 218, 46 Pac. 1069.

The lien was specific as to prices, terms, conditions, and provided generally that claimant was to be paid the "reasonable market thereof." Santa Monica Lumber & Mill Co. v. Hege, 113 Cal. 376, 51 Pac. 555; McClain v. Hutton, 131 Cal. 132, 61 Pac. 273, 63 Pac. 182, 622 (1900); Continental Bldg. & L. Asso. v. Hutton, 144 Cal. 609, 78 Pac. 21; Sandberg v. Victor Gold & S. Min. Co. 24 Utah, 1, 66 Pac. 360.

Where the contract of employment makes no provision for compensation, the law implies a promise to pay what the services are reasonably worth. Millar v. Cuddy, 43 Mich. 273, 38 Am. Rep. 181, 5 N. W. 316; Sandberg v. Victor Gold & S. Min. Co. 24 Utah, 1, 66 Pac. 360.

Thomas M. Cooney, Palmer, Craven, & Burnes, and A. J. Bessie, for respondent.

Appellants have wholly failed to identify the grain as having been grown on any of the land described in the lien statement. The lien was therefore properly ruled out when offered in evidence. Parker v. First Nat. Bank, 3 N. D. 87, 54 N. W. 313.

The law is peremptory in requiring the lien statement to contain a description of the land on which the grain is grown, and such grain must be connected up and identified. Martin v. Hawthorn, 3 N. D. 412, 57 N. W. 87, 5 N. D. 66, 63 N. W. 895; Moher v. Rasmusson, 12 N. D. 71, 95 N. W. 152; Gorthy v. Jarvis, 15 N. D. 509, 108 N. W. 39; Comp. Laws 1913, § 6855.

The law also requires the thresher's lien statement to show the "price agreed upon." Comp. Laws 1913, § 6858; Phelen v. Terry, 101 Minn. 454, 112 N. W. 872; Rev. Laws 1905, § 3546.

Omission to set forth the agreed price is fatal to the lien. *Lavin v. Bradley*, 1 N. D. 291, 47 N. W. 384.

No specific property having been identified in this replevin action, no judgment could possibly be entered for any specific property or its value. *Welch v. Smith*, 45 Cal. 230; *Cooke v. Aguirre*, 86 Cal. 479, 25 Pac. 5; *Pierce v. Langdon*, 3 Idaho, 141, 28 Pac. 401; *Hawley v. Kocher*, 123 Cal. 77, 55 Pac. 696; *Schwarz v. Lee Gon*, 46 Or. 219, 80 Pac. 110; *Dexter v. Olsen*, 40 Wash. 199, 82 Pac. 286.

BURKE, J. Action in claim and delivery. Plaintiff demands possession of "so much of the grain above described as is of the worth and value of \$431.15." He claims that he threshed for the defendant, filed a lien for his bill, and now desires possession of enough grain to enforce the same. Defendant interposed a general denial. Just before the trial it was demanded that plaintiff elect to stand upon a contract price for the alleged threshing or for the reasonable value thereof. He elected to stand on the "reasonable price" of the work done. The jury was impaneled and testimony taken. A dispute developed between the parties as to the terms of their contract.

Defendant gave his version of the contract as follows:

Q. Tell the jury what you said to him.

A. This young boy came, Mr. Houglum. I say, "You thresh in my place." He says, "How many acres?" I say, "I and my neighbors, George Barney and Mrs. Williams, have got 300 acres." He says, "How much you pay me a bushel to thresh—all the wheat good?" I say, "Yes,—but some frost," He says, "Ten cents a bushel, good wheat; 11 cents, frozen wheat, 22 cents, flax."

Q. What was said about the oats?

A. Oats, he said 6 cents.

Q. This was for threshing from the shock?

A. Shock.

.

Q. Was there anything said about the condition of the flax?

A. There was no use talking because he was across that field—Mr. Houglum, he was across that field.

33 N. D.—40.

Mr. Houghlum, upon the stand, testifies regarding the same transaction as follows:

Q. Was anything said about the price?

A. No, sir.

Q. Did you have any talk with the man at his place about what was to be the price for threshing this grain?

A. I believe I did at the machine.

Q. Had you threshed at that time?

A. Yes, sir.

Q. Before you threshed the wheat, was there any talk between you and him about what you were to charge for threshing it?

A. No, sir.

.
Q. When was the first time that you had any talk with him about the charges?

A. After we started threshing the wheat.

Q. What had you threshed at that time, if anything?

A. Wheat.

Q. Had you threshed oats?

A. No, sir.

Q. What was that talk?

A. I told him I wanted 14 cents for it; he said, "All right."

Q. What was the talk about the oats?

A. There was no talk about it.

Q. What was said about the flax, if anything?

A. At the dinner table I asked him for \$25 a day and expenses, and he refused.

Q. State to the jury all about that conversation.

A. I started threshing one afternoon. Threshed about 100 bushels or 140 bushels (flax) and then threshed wheat. Next morning in the forenoon I asked him for \$25 a day and expenses to thresh the rest of his flax, and he refused. I told him I would not thresh it. He said, "All right, you may pull out." I finished up his wheat and pulled out.

Defendant refused to pay the bill because plaintiffs would not thresh his flax. During the progress of the trial it developed that the grain was grown upon three-quarter sections of land, the fields running across the line, and that the bundles had been taken indiscriminately

from all parts of the said three quarters, it being therefore impossible to tell upon what quarter section any of the grain was grown. Plaintiffs finally offered in evidence the thrasher's lien, which, upon examination, proved to describe but two of the quarter sections of land. Objection was made to its introduction, upon the grounds that it did not describe the land upon which the grain was grown,—that certain portions of the grain were grown upon a quarter not described in said lien; that the lien did not set out the contract price, but did describe a price repudiated by plaintiff's own testimony. Objection was further made upon the grounds that the lien was in favor of individuals only, while the suit was upon behalf of the partnership. The court sustained the objection, stating that the principal reason for so doing was that the grain in dispute was not all raised upon the land, and it was impossible to show whether any portion of the grain in dispute was actually raised upon the land covered by the lien. Plaintiffs then offered to show that the mistake in the lien was unintentional, to which the objection was made that the said intent was immaterial. This objection was sustained. Plaintiffs offered no further testimony, and there was a directed verdict for the defendant. This appeal follows. Appellant urges three groups of errors: First, that the court erred in excluding testimony as to what had become of the grain; second, in excluding the lien; and third, in rejecting the offer to show that the mistake in the lien was unintentional. We will discuss those in the order named:

(1) This is a minor question, and we find, upon an examination of the evidence, that defendant admitted that the grain was sold and could not be returned. We will therefore pass this without further discussion.

(2) We do not believe it was error to reject the lien. There are several reasons for this conclusion, but we will mention but one. It must be remembered that this is not an action to foreclose the lien, nor an action upon the account. Plaintiff has designated certain grain which, he says, was raised upon a certain described tract of land, threshed thereon by him. He demands possession of this grain to impress it with his thrasher's lien. The suit is for the possession of particular grain, not upon the account. Upon the trial it was proved that some of the grain was raised upon other land, and that it was

impossible to identify the grain upon which he could claim a lien. The fact that he had filed a lien upon part of the land is immaterial. Whether the lien was admitted or rejected, defendant must fail in his action. *Parker v. First Nat. Bank*, 3 N. D. 87, 54 N. W. 313; *Martin v. Hawthorn*, 3 N. D. 412, 57 N. W. 87, 5 N. D. 66, 63 N. W. 895; *Gorthy v. Jarvis*, 15 N. D. 509, 108 N. W. 39.

This renders it unnecessary to pass upon the other questions; for instance, whether the mistake as to the price for which the threshing was to be done vitiated the lien. The lien was properly rejected.

(3) Nor was it error in the trial court to reject plaintiff's offer to show that the mistake was unintentional. The lien was not being rejected on account of fraud, but because it did not attach to the grain in controversy. In other words, the lien offered could not be properly connected up with the grain the possession of which plaintiff was seeking. Therefore his intention to have filed lien against other land was immaterial. We believe it is conceded that, if there was no error in the rulings aforesaid, the judgment was properly directed, as there is no evidence upon which a verdict for plaintiff could be sustained. Judgment is accordingly affirmed.

**POWERS ELEVATOR COMPANY v. WILLIAM STOLZ and
Northern Real Property Company, a Corporation.**

(157 N. W. 693.)

Action to foreclose mechanic's lien; trial *de novo*. Evidence examined, and held:

Mechanic's lien — action to foreclose — trial de novo — evidence — lands sold under contract — materials furnished to purchaser — knowledge of by vendor — extent of lien — restricted to buyer's equity in land.

1. That the land company was not aware of the purchase of the lumber used in improvements upon a farm sold by it under contract for deed to Stolz, until nearly a year after said improvements had been made, and further that said land company never assumed the indebtedness. The operation of the lien was therefore properly restricted to Stolz's equity in the land.

Trial court — discretion — costs — taxation.

2. Under the proceedings of this case set forth in the opinion, the trial court did not abuse its discretion in taxing the costs in favor of the land company.

Opinion filed April 10, 1916.

Appeal from the District Court of Stutsman County, *Coffey, J.*
Affirmed.

S. E. Ellsworth, for appellant.

The agreement of a grantee of an interest in real property to assume encumbrances thereon need not be in any stated form. It may be in the instrument under which the grantee acquires title, or by a separate written instrument, or it may even rest in parole, and in such case is not within the statute of frauds. It is separate and distinct from the conveyance. 27 Cyc. 1345, notes, 4 and 5; *Moore v. Booker*, 4 N. D. 543, 62 N. W. 607; *Bossingham v. Syck*, 118 Iowa, 192, 91 N. W. 1047; *Neiswanger v. McClellan*, 45 Kan. 599, 26 Pac. 18.

An agent to buy real estate may bind his principal to an agreement to assume encumbrances, even though the principal did not specially authorize it and did not know it had been made. *Schley v. Fryer*, 100 N. Y. 71, 2 N. E. 280.

The principal cannot, by private communications with his agent, limit the authority which he allows the agent to assume. *Clark*, Contr. p. 734, and cases cited; *Robinson v. American Fish & Oyster Co.* 17 Cal. App. 212, 119 Pac. 388; *Cowie v. National Exch. Bank*, 147 Wis. 124, 132 N. W. 900.

Every person for whose immediate use and benefit any building, erection, or improvement is made, having the capacity to contract, including guardians of minors or other persons, shall be included in the word "owner" thereof. Comp. Laws 1913, § 6828.

The owner shall be presumed to have consented to the furnishing of materials or labor, if at the time he had knowledge thereof and failed to give notice to the person who would be entitled to a mechanic's lien. Comp. Laws 1913, § 6814; *Johnson v. Soliday*, 19 N. D. 463, 126 N. W. 99; *North Dakota Lumber Co. v. Haney*, 23 N. D. 504, 137 N. W. 411.

The plaintiff was entitled to costs. Comp. Laws 1913, § 7792.

Prima facie the prevailing party in equity cases, as at law, is entitled to costs. 2 Wait, Pr. 472; 5 Enc. Pl. & Pr. 185, 186; Spengler v. Hahn, 95 Wis. 472, 70 N. W. 466; Comp. Laws 1913, § 7793; 11 Cyc. 27, 34; Beckwith v. Beckwith, 11 Colo. 568, 19 Pac. 510; Lawrence v. Getchell, 2 Cal. Unrep. 267, 2 Pac. 746; Couch v. Millard, 41 Hun, 212; Petitpierre v. Maguire, 155 Cal. 242, 100 Pac. 691; McDonald v. Bengé, 138 Iowa, 591, 116 N. W. 602; Kerr v. Tierney, 146 Mich. 97, 108 N. W. 1099; Ferguson v. Popp, 42 Mich. 115, 3 N. W. 287; Meigs v. McFarlan, 72 Mich. 194, 40 N. W. 246; Westfeldt v. North Carolina Min. Co. 100 C. C. A. 552, 177 Fed. 132.

In such cases as this, the district court alone has jurisdiction, and the question as to who shall pay the costs is not determined by the amount of recovery. Carlson v. Beckman, 35 Neb. 392, 53 N. W. 203.

Oscar J. Seiler and Marion Conklin, for respondent.

Under the ordinary contract for the sale of land upon the crop payment plan, where the title is reserved as security for the purchase price, the vendor is in practically the same position as though he had deeded the land to the vendee and taken a mortgage back. Therefore, when the vendee becomes liable upon a mechanic's lien against the land, the interest of the vendor is not subject to the lien, unless it is shown that he acquiesced in the purchase and use of the materials. North Dakota Lumber Co. v. Haney, 23 N. D. 504, 137 N. W. 411; Nearing v. Coop, 6 N. D. 345, 70 N. W. 1044; Wadge v. Kittleson, 12 N. D. 452, 97 N. W. 856; Woodward v. McCollum, 16 N. D. 42, 111 N. W. 623; Salzer Lumber Co. v. Claffin, 16 N. D. 601, 113 N. W. 1036; Johnson v. Soliday, 19 N. D. 463, 126 N. W. 99.

Parties cannot elect to try their cause on one theory in the lower court, and when defeated on that line assume a different position in the appellate court. 3 Cyc. 243.

Where there is evidence to support the findings of the trial court, they will not be disturbed by the appellate court. 3 Cyc. 360, 361, and cases cited; Syllabus in State ex rel. Trimble v. Minneapolis, St. P. & S. Ste. M. R. Co. 28 N. D. 621, 150 N. W. 463; Wykoff v. Kerr, 24 S. D. 241, 123 N. W. 733; Jackson v. Prior Hill Min. Co. 19 S. D. 453, 104 N. W. 207; Lee v. Dwyer, 20 S. D. 464, 107 N. W. 674; Mason v. Fire Asso. of Philadelphia, 23 S. D. 431, 122 N. W. 423;

Driskill v. Rebbe, 22 S. D. 242, 117 N. W. 135; Empson v. Reliance Gold Min. Co. 23 S. D. 412, 122 N. W. 346.

A preponderance of evidence against the trial court's findings of fact must clearly appear from the record on appeal, to overcome the presumption that the facts found are justified. Clarke v. Conners, 18 S. D. 600, 101 N. W. 883; Schmidt v. Anderson, 29 N. D. 262, 150 N. W. 871.

An appellate court will not interfere with the exercise of the discretion of the trial court, in awarding costs or granting allowances, except where abuse clearly appears. 3 Cyc. 342, and cases cited; McKenzie v. Bismarck Water Co. 6 N. D. 375, 71 N. W. 608; Brown v. Skotland, 12 N. D. 451, 97 N. W. 543.

BURKE, J. On the 5th of April, 1910, the Northern Real Property Company sold upon contract a half section of land to the defendant Stolz for \$7,506.84. Among the provisions of that contract was one that Stolz was to pay certain instalments—usually \$600—the first of each November thereafter, until the purchase price had been reduced to a \$1,750 mortgage, which was at that time an encumbrance upon the place. The contract contained the further provision that if the payments were not made and the contract was forfeited, all of the payments made and all of the buildings and improvements should be taken and deemed to be rental for the use and occupation of said premises from the date of the contract to the date of its termination. The first payment was to be \$500, and was covered by additional security in the shape of a chattel mortgage. Stolz's copy of the contract was not to be delivered to him until he had paid this \$500 note. Stolz went into possession of the land and incurred an indebtedness of \$395.50 for building materials purchased of the Powers Elevator Company, for which they filed a lien upon the premises. An examination of the evidence convinces us that the land company knew nothing about this indebtedness until almost a year after the lien was filed. On the 30th of January, 1913, Stolz was in default, having failed to make any of the payments stipulated, and owing at that time considerably over \$8,000 upon his contract. Upon that date the land company sent one Still to the village of Medina to make settlement of the claim. The negotiations were conducted in the bank at that place of which the

cashier was one Stege. Stege, Still, and Stolz were witnesses at the trial and each has given a version of the conversation. Mr. Still was acting under written instructions from the land company, and upon several occasions the president of the land company was called upon over the long-distance telephone, and he also has testified. From all of this testimony we are agreed that in the negotiations Still insisted that the first note of \$500 upon which there was additional security be paid, and that then Stolz should be allowed to remove two small buildings from the place, cancel the contract, and receive back his notes marked paid. Stolz requested the land company to take care of the mechanic's lien, but Still insisted that he was acting under written instructions, and had no authority to assume this obligation, under exhibit 10, which is directed to him, signed by the president of the land company and reads as follows:

Jamestown, N. D., February 12, 1913.

N. $\frac{1}{2}$ —3—138—69

N.E. $\frac{1}{4}$ —35—139—69

Mr. S. W. B. Still,

City,

Dear Steve:—

In compliance with our arrangement of to-day we hand you herewith note of William Stolz for \$500, dated April 5, 1910, due Nov. 1, 1910, drawing interest at 6 per cent per annum from date until due, 12 per cent thereafter until paid. Interest payable Nov. 1, 1910, and annually thereafter. Interest not paid when due to bear interest at the rate of 12 per cent per annum until paid.

This is only one of a number of notes given for the purchase price of the N. $\frac{1}{2}$ of 3—138—69, the total price being \$5,756.84, the only payments made being \$100 applied on account of the whole deal, the proportion of which applied on this note would be about \$8. No other payment has been made on this note.

This is secured by the chattel mortgage upon cattle, copy of which we handed you to-day. We wish to collect this note or take the cattle and conduct the necessary foreclosure proceedings to do so.

We also hand you herewith notice of cancelation to be served personally on Stolz if he can be found, and if not at his residence, the

same as a summons is served. This refers to the N.E. $\frac{1}{4}$ of 35—139—69, another quarter which he has purchased from us.

The matter is turned over to you to handle, with the understanding that if foreclosure proceedings are carried through that it will spoil four days' time for you, and that in that case your compensation is to be \$25 over and above actual and necessary expenses. In case the matter is settled in a way that it does not require very much attention, compensation to you to be proportionately reduced.

Yours truly,

W. B. De Nault,
President.

Still testifies that his instructions were to collect the \$500 from the chattel security and cancel the contract,—that Mr. Stege acted for Stolz and consulted with an attorney before the settlement was finally made. Still denies having assumed the lien. Mr. Stege—among other things—testifies that his bank had furnished Stolz with money to buy seed and feed and other things, and that when Still came up to make the settlement he (Stege) acted as interpreter for Stolz. That after considerable negotiations it was finally agreed that Stolz was to pay the \$500 note and surrender his contract. That the land company in writing authorized the removal of the two frame buildings aforesaid, and that all other buildings were to remain on the property.

He further testifies:

A. I told Mr. Still the Powers Elevator Company held a lien against the buildings on that place, also they had Mr. Stolz's note secured by a chattel mortgage, and that they would have to take care of the lien, and if he would not do so, they should turn the note back to Mr. Stolz without any consideration. Mr. Still said, "We will take care of that." Then it was agreed that we would pay this \$500 and interest.

Mr. Stege's testimony is undoubtedly honestly given, but upon his whole testimony his recollection appears vague and unsatisfactory.

Stolz testifies as follows:

Q. At the time that you signed this paper, exhibit E, what did Mr. Still, for the defendant Northern Real Property Company, agree you should have in return for this cancelation?

A. I wanted to take all of the buildings off, but he allowed me to take off only the summer kitchen and the barn.

.
Q. What was said about the mechanic's lien on the other building at that time?

A. I could not very well say. The talk was in English. I could not understand, but Mr. Stege will tell you about that when he comes to Jamestown.

De Nault, the president of the land company, testifies that he had given specific instructions to Still in writing. That Stege called him up over the telephone from Medina, and asked him if he would be responsible for the mechanic's lien, and that he told him that he would not. Upon the whole testimony we have no hesitancy in holding, as did the trial court, that there was no agreement on the part of the land company to assume this indebtedness. The conversation in the bank culminated in the surrender of the contracts as aforesaid. This was effected by an instrument in writing signed by Stolz and his wife. This action was brought by the lumber company to foreclose its mechanic's lien, and, among other relief, asked that the land company be required to set forth its claim to the real property, and that they be decreed to have no interest superior to the lien of plaintiff. Defendant answered with a general denial setting up all of the facts in reference to their title, and asking that the title of the said defendant land company be quieted to such claim of the plaintiff, and that plaintiff be forever barred and enjoined from asserting the same. The matter came on for trial before the court, when the attorney for the lumber company made the following statement into the record: "We are in the action seeking, of course, to reach the equity of the defendant Stolz in this property by this foreclosure. Our contention will be to the effect that at the time of the filing of the lien the amount due upon the contract was very considerably less than the defendant Stolz agreed to pay for the land. There will be further evidence to the effect that the Northern Real Property Company, the other defendant, assumed the lien and is liable directly for its payment." Immediately following this statement the attorney for the land company had the following statement incorporated into the record: "We admit that at the time of the sale of the

material to the defendant Stolz he was in possession of the land in question under a contract of purchase, and we concede that the plaintiff has a perfect right to foreclose its mechanic's lien upon whatever equity the defendant Stolz had in the land at the time, and subject the equity of said Stolz to its lien, and to step into his shoes and carry out his contract, and that the plaintiff could not be deprived of such right by the defendant Stolz surrendering and canceling his contract; and that such act on the part of Stolz does not, in any manner, affect plaintiff's rights, and we are perfectly willing to and will show to the court exactly what has been paid by the defendant Stolz on this contract, and the balance due thereon, and we are willing that a decree be entered in this action for such foreclosure and for the sale of whatever equity the court finds that the defendant Stolz had in such land, but we do not admit that this defendant ever assumed the lien or is liable directly for its payment." Plaintiff did not accept the offer of the land company, and the trial proceeded, resulting in a decree that the lumber company had the lien upon Stolz's equity only, and the land company recovered its costs. This appeal follows, and a trial *de novo* is demanded. The evidence introduced covers 198 pages of the statement of the case. We are, of course, unable to reproduce the same, but after a careful study thereof have reached the conclusion that the land company was not aware of the purchase of the lumber or its use upon the land, and in the final settlement did not assume the indebtedness. The question, then, is one of law, and we agree that the mechanic's lien was properly restricted to Stolz's equity. This is so well settled by decisions of our court that we will not further discuss the proposition. *North Dakota Lumber Co. v. Haney*, 23 N. D. 504, 137 N. W. 411; *Johnson v. Soliday*, 19 N. D. 463, 126 N. W. 99; *Salzer v. Claflin*, 16 N. D. 601, 113 N. W. 1036; *Woodward v. McCollum*, 16 N. D. 42, 111 N. W. 623; *Wadge v. Kittleson*, 12 N. D. 453, 97 N. W. 856; *Nearing v. Coop*, 6 N. D. 345, 70 N. W. 1044.

(2) The only remaining question relates to costs. Appellant states that he is entitled to costs under § 7792, Comp. Laws 1913, which reads as follows: "In all actions or proceedings for the foreclosure of a mortgage upon personal property or of a mortgage or other lien upon real property, the plaintiff or person commencing such action or proceeding shall be entitled to tax as a part of his costs, when the amount

of the debt secured by such mortgage or liens does not exceed the sum of \$500, the sum of \$25."

Defendant, on the other hand, insists that the costs should be taxed under § 7795, Comp. Laws 1913, which reads as follows: "In actions other than those specified in § 7794, costs may be allowed for or against either party in the discretion of the court. In all actions when there are several defendants not united in interest, and making separate defenses by separate answers, and the plaintiff fails to recover judgment against all, the court may award costs to such of the defendants as have judgment in their favor."

It is clear that this action is not one of those enumerated in § 7794, and is, therefore, controlled by § 7795. The matter of costs, therefore, is largely within the discretion of the trial court, and this discretion should not be disturbed except for abuse. 3 Cyc. 342; *McKenzie v. Bismarck Water Co.* 6 N. D. 361, 71 N. W. 608; *Brown v. Skotland*, 12 N. D. 445, 92 N. W. 543.

The costs then resting in the sound discretion of the trial court, we have but to refer to the facts already enumerated to show that such discretion was not abused. While plaintiff is the prevailing party (and recovered costs) against Stolz, he cannot be said to be the prevailing party against the land company. He demanded in his complaint a lien upon the land company's interest in the land, and this condition continued until the beginning of the trial, when for the first time he intimated that he might be satisfied with a judgment against Stolz's equity, but even then coupled this with an assertion that the land company had assumed the debt. At said time defendant offered to plaintiff the exact relief finally recovered. It is therefore evident that plaintiff's exorbitant demands necessitated the succeeding litigation, and the trial court was fully justified in placing the burden of costs upon his shoulders. The judgment is accordingly affirmed.

CHRISTIANSON, J. (concurring specially). I concur in an affirmance of the judgment, but I do not believe that the plaintiff was entitled to recover costs against the Northern Real Property Company, either as a matter of right or discretion. Manifestly § 7792, Comp. Laws 1913, cannot be construed so as to justify the allowance of such costs. This section is merely ancillary to the other statutory pro-

visions for the allowance of costs, and the legislature did not intend by this section to allow a plaintiff in a foreclosure action to tax costs against any additional or different parties than those provided for in other statutory provisions relative thereto. The intent of this section was merely to allow a party foreclosing a mortgage upon real or personal property or a lien upon real property, to tax as an additional item of costs a certain amount for attorneys' fees. I am aware of no provision in our statutes which would authorize a court as a matter of discretion to award costs to a plaintiff in a foreclosure suit, except as against a defeated party or parties. Ordinarily, the costs taxed in such actions become a part of the judgment for the mortgage debt, and may be enforced in the same manner and to the same extent as the judgment for the debt itself. In this case the plaintiff was permitted to, and did, tax such costs against the principal defendant, Stolz, and plaintiffs' judgment for foreclosure includes such costs. Plaintiffs' costs were taxed, and are a part of a personal judgment against Stolz and a lien against his equity in the real property involved. But so far as the defendant Northern Real Property Company is concerned, plaintiff did not prevail. In its complaint the plaintiff asserted that its lien was prior to all claims and interests which the Northern Real Property Company had or claimed in the real estate in question, which necessitated that the Northern Real Property Company present an answer setting forth in full the nature of its interest in such realty. Before the commencement of the trial, as stated in the majority opinion, the contentions of the parties were fully and plainly stated. The plaintiff might then and there, without any trial whatever, have obtained the judgment which it eventually obtained; but plaintiff was not satisfied with this, and sought to reach not only the equity of the defendant Stolz in the land, but sought also to establish a personal liability on the part of the Northern Real Property Company, and obtain an adjudication that this company had assumed the payment of the lien. The very issue which plaintiff persisted in litigating was determined adversely to its contentions. How, then, can it be said that it was a prevailing party as against such defendant? And even under the provisions of § 7795 the court had no power to award costs against a prevailing defendant. Hence, it seems to me that the trial court had no

power, discretionary or otherwise, to award costs against the Northern Real Property Company, and it merely performed its plain and manifest duty in refusing to do so.

C. S. MOORES, E. A. Lathrop, and M. B. Cassell v. GLEN E. TOMLINSON and Charles Tomlinson.

(157 N. W. 685.)

Pleadings — answer — new matter — reply — court — order of — counterclaim — exception — deemed controverted — direct denial — avoidance — evidence.

1. Under the provisions of §§ 7467-7477 and 7452, Compiled Laws 1913, a plaintiff is not required to reply to new matter in an answer not constituting a counterclaim, except by order of the court; but every allegation of new matter in the answer, not constituting a counterclaim is deemed controverted by the plaintiff as upon a direct denial or avoidance by operation of law, and the plaintiff may introduce evidence of any fact tending to deny or avoid the new matter set forth in the answer.

Personal property — sale of — vendor — possession — must be accompanied by — retained by vendor — fraud — presumption — creditors.

2. Following *Drinkwater v. Pake*, ante, 190, it is held that under the provisions of § 7221, Compiled Laws, every sale made by a vendor of personal property in his possession or under his control, unless accompanied by an immediate delivery and followed by an actual and continued change of possession of the property sold, is presumed to be fraudulent and void as against creditors of the vendor, unless those claiming under the sale make it appear that the same was made in good faith and without any intent to hinder, delay, or defraud such creditors.

Opinion filed April 10, 1916.

From a judgment of the District Court of Steele County, *Pollock, J.*, defendants appeal.

Affirmed.

W. J. Courtney, for appellants.

Fraud is a question of fact in this jurisdiction, and must be pleaded. The bill of sale upon which appellants relied could only be impeached

for fraud, and since this was not pleaded, the court's ruling thereon was error. *Harkins v. Cooley*, 5 S. D. 227, 58 N. W. 560; *Cobb v. Cole*, 55 Minn. 235, 56 N. W. 828, 51 Minn. 48, 52 N. W. 985; 8 Enc. Pl. & Pr. p. 945, notes 1 and 2; *State ex rel. Dorgan v. Fiske*, 15 N. D. 219, 107 N. W. 191; *Dalrymple v. Security Land & T. Co.* 9 N. D. 306, 83 N. W. 245; *Paulson v. Ward*, 4 N. D. 103, 58 N. W. 792; *Rundle v. Delaware & R. Canal Co.* 14 How. 100, 14 L. ed. 343; *Patton v. Taylor*, 7 How. 132, 12 L. ed. 637; *Voorhees v. Bonesteel*, 16 Wall. 16, 32, 21 L. ed. 268, 271.

A bill of sale as security is good. *McCormick Harvester Mach. Co. v. Caldwell*, 15 N. D. 132, 106 N. W. 122.

A creditor cannot attack any transaction for fraud, unless the property transferred was such as he could seize to satisfy his claim. *Cresswell v. McCaig*, 11 Neb. 222, 9 N. W. 52; *Simon v. Levy*, 36 Fla. 438, 18 So. 777; *Perisho v. Perisho*, 71 Ill. App. 222; *Pell v. Tredwell*, 5 Wend. 661; *McDonald v. O'Neil*, 161 Pa. 245, 28 Atl. 1081; *Zuver v. Clark*, 104 Pa. 222; *Oul Nat. Bank v. Heckman*, 148 Ind. 490, 47 N. E. 953.

The plaintiff's mortgage was made and accepted by plaintiff subject to Tomlinson's \$2,000 mortgage, and the plaintiff is not in any position now to question the validity of such mortgage. *Perrine v. First Nat. Bank*, 55 N. J. L. 402, 27 Atl. 640; *Tuite v. Stevens*, 98 Mass. 305; *Howard v. Chase*, 104 Mass. 249.

The presumption that the findings of the trial court are right does not prevail in a trial *de novo* in an equity case on appeal. *Englert v. Dale*, 25 N. D. 587, 142 N. W. 169.

A general objection to evidence of the same class is sufficient. *American Mortg. Co. v. Mouse River Live Stock Co.* 10 N. D. 291, 86 N. W. 965.

C. S. Shippy and *H. R. Turner*, for respondents.

No reply was here necessary to enable plaintiffs to prove fraud on the trial. No counterclaim is pleaded by answer, and no request for or order by the court for a reply was made. *American Case & Register Co. v. Walton & D. Co.* 22 N. D. 187, 133 N. W. 309.

The property mentioned in the bill of sale was at all times thereafter in the possession of the vendor, just the same as before the bill of sale.

It was in fraud of the vendor's creditors, and void. Comp. Laws 1913, § 7221.

In this case there is much testimony in support of the findings of the trial court, and they will not therefore be disturbed on appeal. *Dammann v. Schibbsby Implement Co.* 30 N. D. 15, 151 N. W. 985; *Steidl v. Aitken*, 30 N. D. 281, L.R.A.1915E, 192, 152 N. W. 276; *Krause v. Krause*, 30 N. D. 54, 151 N. W. 991.

The general rule is, in actions where the fact of fraudulent conveyances is an issue, that statements made by the grantor after the transaction, and not made in the presence of the grantee, are not binding on the grantee and therefore not admissible. But, the exception is that where a common purpose or design to hinder, delay, or defraud creditors is claimed, then such statements become admissible. *Hartman v. Diller*, 62 Pa. 37; *Boyer v. Weimer*, 204 Pa. 295, 54 Atl. 21; *Souder v. Schechterly*, 91 Pa. 83; 6 Enc. Ev. 156, ¶ D. note, 33; *Murch v. Swensen*, 40 Minn. 421, 42 N. W. 290; *Banks v. McCandless*, 119 Ga. 793, 47 S. E. 332; *Moore v. Tearney*, 62 W. Va. 72, 57 S. E. 263.

CHRISTIANSON, J. This is an action for the foreclosure of a certain chattel mortgage executed and delivered by the defendant Glen E. Tomlinson to the plaintiffs on March 30, 1911. The execution of the notes and mortgages and the amount due thereon is admitted, but the defendant Charles Tomlinson in his answer claims to be the absolute owner of all of the property described in the mortgage which plaintiffs seek to foreclose by virtue of a bill of sale executed and delivered to him by the defendant Glen E. Tomlinson on January 26, 1911.

The action came on for trial upon the issues as framed by these pleadings, and resulted in a judgment in favor of the plaintiffs for the relief prayed for in the complaint. The defendants have appealed from this judgment, and demanded a trial anew in this court.

The defendants are father and son, and the evidence shows that Charles Tomlinson, the father, in 1905 became the owner of considerable land in Steele county in this state. Both defendants were at that time residents of Geneseo, Illinois. In 1906 the defendant Charles Tomlinson placed his son, Glen E. Tomlinson, upon the Steele county farm, and he continued to reside upon and farm this land from that time on, and was permitted to exercise apparent dominion over the farm

and all personal property thereon. He sold the produce, and purchased the necessary supplies, horses, and machinery. The defendants testified that Charles Tomlinson in the first place owned a one-half interest in such personal property, but that he afterwards sold the same to Glen E. Tomlinson and retained a \$2,000 interest. The defendant Charles Tomlinson did not reside on the farm, but continued to reside at Geneseo, Illinois, and later at Minneapolis, Minnesota. He came up to the farm at various times, however, and at times stayed for a considerable length of time. The testimony shows that at one of such times at least he made trips to town and purchased supplies from the various merchants and dealers, and had the same charged to his son. This condition continued from 1906 up to the fall of 1913. On January 26, 1911, the defendant Glen E. Tomlinson executed and delivered to his father, Charles Tomlinson, a bill of sale of all the personal property on the farm. The bill of sale was recorded in the office of the register of deeds of Steele county on January 30, 1911. The defendant Glen E. Tomlinson, however, continued to possess and use the personal property as before, and on March 30, 1911, he executed and delivered a chattel mortgage thereon to the plaintiffs. Glen E. Tomlinson continued to retain possession of and exercise full control over the personal property in question until the fall of 1913, when Charles Tomlinson claims that he took possession thereof, but the evidence shows that even after this time Glen E. Tomlinson continued to reside upon the farm and use the personal property much as before. The trial court found that the bill of sale to Charles Tomlinson was fraudulent and void as against plaintiffs' mortgage. And the principal, and practically the only, question on this appeal is whether this finding is justified under the pleadings and the evidence in the case.

(1) Defendants contend that the question of fraud was not pleaded, and that therefore it was error for the trial court to admit evidence tending to establish fraud and render judgment upon such evidence. Defendants' counsel says: "The pleadings themselves showed that our bill of sale was good and superior, unless challenged for fraud. No question of fraud was pleaded. Consequently, no burden rested upon us to disprove fraud, for the statute raising the presumption could not be invoked without a plea."

Defendants' counsel raised this question in the trial court by a
33 N. D.—41.

motion for judgment on the pleadings, and by objections to the introduction of evidence offered by plaintiffs tending to prove that the bill of sale was fraudulent and void. In this court these rulings of the trial court are vigorously assailed, and defendants' counsel has cited numerous authorities in support of the contention that such rulings were erroneous. An examination of the authorities cited, however, shows that they were cases wherein the plaintiff sought to set aside instruments on the ground of fraud, and wherein the courts affirmed the well-known rule that a party asserting fraud must both plead and prove facts sufficient to establish it. The rule announced in these authorities is uniformly recognized by the courts of this country, but is not applicable to the pleadings in the case at bar. It is conceded that the answer of Charles Tomlinson did not contain a counterclaim, but set forth defensive matter only. The defense set forth in the answer was that Charles Tomlinson was the absolute owner of the property, and that consequently Glen E. Tomlinson had no mortgagable interest therein. It was not necessary for plaintiffs to reply to the new matter in the answer, because, under the express provisions of our Code of Civil Procedure, such new matter was "deemed controverted by the adverse party as upon a direct denial or avoidance, as the case may be." Comp. Laws 1913, §§ 7467-7477. See also Comp. Laws 1913, § 7452. By virtue of these statutory provisions the allegations of the answer were controverted "as upon a direct denial or avoidance" by operation of law, "and the plaintiff might prove in response thereto any fact by way of denial or of confession and avoidance." Pom. Code Rem. § 588; *American Case & Register Co. v. Walton & D. Co.* 22 N. D. 187, 133 N. W. 309; *Erickson v. Elliott*, 17 N. D. 389, 117 N. W. 361; *Scott v. Northwestern Port Huron Co.* 17 N. D. 91, 115 N. W. 192; *Koester v. Northwestern Port Huron Co.* 24 S. D. 546, 124 N. W. 740; *McCarthy Bros. Co. v. Hanskutt*, 29 S. D. 535, 137 N. W. 286, Ann. Cas. 1914D, 889.

(2) Defendants' counsel next contends that plaintiffs have failed to establish the fraudulent character of the bill of sale by sufficient competent proof. Under the laws of this state: "Every sale made by a vendor of personal property in his possession or under his control and every assignment of personal property, unless the same is accompanied by an immediate delivery and followed by an actual and continued

change of possession of the property sold or assigned, shall be presumed to be fraudulent and void as against the creditors of the vendor or assignor, or subsequent purchasers or encumbrancers in good faith and for value, unless those claiming under such sale or assignment make it appear that the same was made in good faith and without any intent to hinder, delay or defraud such creditors, purchasers or encumbrancers." Comp. Laws 1913, § 7221.

In this case the evidence conclusively established the fact that the purported sale evidenced by the bill of sale was not accompanied by any change of possession, but that Glen E. Tomlinson retained possession of and continued to exercise dominion over the property as before. This condition rendered the sale presumptively fraudulent, and placed upon the defendants the burden of proving that the sale was made in good faith, and without intent to hinder, delay, or defraud the creditors of Glen E. Tomlinson. See *Drinkwater v. Pake*, ante, 190, 156 N. W. 930. In our opinion the trial court correctly concluded that the defendants failed to sustain this burden of proof, and we are agreed that the evidence, considered as a whole, fails to overcome the presumption of fraud created by the statute.

(3) Defendants' counsel next contends that under the holding of this court in *McCormick Harvester Mach. Co. v. Caldwell*, 15 N. D. 132, 106 N. W. 122, a bill of sale intended as security is not within the terms of the statute above quoted. A sufficient answer to this contention is that defendant Charles Tomlinson in his answer claims *absolute ownership* under the bill of sale, and does not claim that it was intended as security. No amendment was made, but throughout the trial and on this appeal the answer asserts that the bill of sale was intended to transfer the absolute title and ownership of the property.

(4) Defendants' counsel next contends that Charles Tomlinson had retained a \$2,000 interest in the property mortgaged, and that, therefore, formal delivery of the chattels sold was not essential. In support of this contention defendants' counsel cites and relies upon *Love v. Schmidt*, 26 Okla. 648, 31 L.R.A.(N.S.) 1162, 110 Pac. 665, Ann. Cas. 1912B, 458. An examination of that authority shows that it is based upon facts radically different from the case at bar, and in no manner supports the proposition contended for by defendants' counsel. In *Love v. Schmidt*, supra, Henry J. Schmidt was the owner of

a three-fourths interest in 100 acres of wheat in stack. Henry F. Schmidt owned the remaining one-fourth interest. Henry J. Schmidt was in possession of the property, and while in such possession he purchased the one-fourth interest of Henry F. Schmidt. The court held that inasmuch as Henry J. Schmidt had possession of all the property sold at the time of the sale, no formal delivery was necessary. The decision of the Oklahoma court may be epitomized in the following excerpts therefrom: "It is contended that here a different rule applies for the reason that the evidence tends to prove, and the court, in finding generally for plaintiff, necessarily found, that David Schmidt and Henry F. owned all the wheat jointly; that the former, at the time of the sale of the interest of Henry F., was in possession of the whole of it; and that an actual delivery was not necessary to pass the title to that interest as against the creditors of the vendor. In this we concur. Freeman on Judgments, § 167, states the rule thus: 'If A and B together own personal property, of which A is in actual possession, and B sell his moiety to C, the possession of A immediately becomes the possession of C also. Therefore being at once, by presumption and construction of law, put in possession as tenant in common with A, it is not necessary that C should take actual possession with A to make his purchase good under the statute of frauds as against the creditors of B. If A, the cotenant in possession, had sold his interest, then the sale should have been followed by an actual change of possession, because there was no cotenant whose actual possession could have operated for the benefit of A's vendee.' And in § 153, of Freeman on Executions, says: 'The sale by one of several joint owners also furnishes an exception to the rule that there must be a change of possession. *If the cotenant selling is in the sole possession, he ought to give possession to his vendee*; but, if the other cotenants are in possession, the vendor has no right to take it from them. He may therefore from necessity make a valid sale without placing the property in the custody of his vendee.'

. . .

"We are therefore of opinion that as Henry F. had not, at the time of the sale of his interest therein, possession or control of the joint property, immediate delivery and change of possession of the property sold was not necessary to pass the title to this vendor. . . .

"There is another view of the evidence reasonably tending to support

the judgment of the trial court, and that is that, as Henry J. had permitted David Schmidt and Henry F. to stack their joint wheat on his premises, a formal delivery of the interest of Henry F. therein to him as vendor would be not only impracticable, but a vain act and unnecessary to make a sale to him thereof good as against the creditors of Henry F. In *Lake v. Morris*, 30 Conn. 201, plaintiff, at the time of the purchase, was keeping the horses of his nephew, Lake, in his stable. The defendant claimed that because there was no formal delivery of possession of them by the vendor to the purchaser, the sale was, in point of law, fraudulent and void against creditors; but the court held otherwise, and, in effect, said that no such delivery could have taken place without first taking the horses from the plaintiff's possession for the mere purpose of redelivering them to him, and that the trial court was correct in instructing the jury that no such act was necessary. And so we say here that it would not only have been impracticable to carve out of this wheat in the stack the interest of Henry F. for the purpose of delivering it to plaintiff, but, had it been done, it would have been for the sole purpose of permitting him to accept and stack it again on the premises, which would have been a vain act and unnecessary to pass the title."

In the case at bar Glen E. Tomlinson had sole possession of the chattels, both prior to and at the time of the sale. Charles Tomlinson did not have possession in any manner, nor did he receive possession at the time of the sale, but permitted Glen E. Tomlinson to retain possession and exercise control and dominion of ownership over the property as before. Obviously the Oklahoma case is authority against, rather than for, the defendants in this case. Defendant also contends that the court should have adjudged Charles Tomlinson to have a \$2,000 interest in the property. This claim was not presented in defendants' answer. Defendants' testimony is very vague and unsatisfactory as to the exact nature of this claim or interest, and we believe that the trial court was justified in failing to find that Charles Tomlinson had any such claim or interest.

We approve the findings of fact and conclusions of law of the trial court, and it follows that the judgment appealed from must be affirmed. It is so ordered.

JAMES McLEAN v. JOSHUA FOISIE.

(157 N. W. 840.)

Malicious maiming — biting of portion of ear — action for damages — complaint — allegations — defendant — admissions of — biting — not necessary to his protection — assault — defense of person from — right of — force necessary to protection.

Where a complaint charges the defendant with maliciously biting off a portion of the ear of the plaintiff, and the defendant himself testifies that such biting was not necessary to his protection from the assault of the plaintiff and that at no time during said assault did he consider it to be necessary, no prejudice can be assumed to have followed from an instruction which tells the jury that a person who is assaulted by another is justified in using "such force as is reasonably necessary to defend himself."

Opinion filed April 11, 1916.

Action for maliciously biting the ear of plaintiff.

Appeal from the District Court of Cavalier County, *Kneeshaw, J.*
Judgment for plaintiff. Defendant appeals.

Affirmed.

Statement of facts by BRUCE, J.

This is an action to recover damages for an assault and battery, and the defendant appeals from a judgment which was rendered against him.

The only charge which is made in the complaint is:

"That on or about the 7th day of July, 1911, the above-named defendant did unlawfully and maliciously, and with intent and purpose to do bodily injury to the plaintiff, bite and tear a large piece off and from one of the ears of the plaintiff, and did by such means permanently disfigure and maim the plaintiff."

The answer denies "each and every allegation of the complaint except such as is hereinafter admitted," and then alleges that the plaintiff's horse had trespassed upon the defendant's land, and—

"That on the said 7th day of July, 1911, the plaintiff, without first having taken the steps provided by law to secure possession of said

animal, and without legal authority, did come upon said premises of this defendant, and endeavored by force and violence to take from the possession of this defendant the said estray, and that any damage sustained by the plaintiff at the hands of this defendant and any bodily injury sustained by the plaintiff at the hands of this defendant on the said 7th day of July, 1911, or at any time, was necessarily inflicted by this defendant in resisting the force and violence used by the plaintiff in endeavoring to take said estray from the lawful possession of this defendant, and that this defendant, in resisting the force and violence of said plaintiff in his efforts to take possession of said estray, used only such force and violence as was necessary to overcome the force and violence of plaintiff in his efforts to unlawfully secure possession of said estray, and that any damage or injury sustained by the plaintiff at the hands of the defendant as alleged in plaintiff's complaint was occasioned by his own wrongdoing."

A verdict was rendered for the plaintiff, and the defendant appeals.

George M. Price, for appellant.

A person when assaulted has the right to use that degree of force in resisting the assault as seems reasonably necessary to him at the time and under all the surrounding circumstances,—that is, such force as would have appeared to an ordinarily careful, prudent man, to be necessary at the time. The basis of a man's judgment in such cases is founded upon the facts and circumstances as they appear at the time of the assault, for usually, in such cases, there is not much time for sober deliberation, if one is to act in his own defense, and for his self-preservation from injury. The plaintiff was guilty of the first assault. *Drew v. Comstock*, 57 Mich. 176, 23 N. W. 721.

A person violently assaulted without cause, by another, is not limited to the use of force so long only as the necessity for self-defense exists, but may chastise the aggressor within the natural limits of the provocation received, and will not thereby be guilty of assault and battery. *People v. Pearl*, 76 Mich. 207, 4 L.R.A. 709, 15 Am. St. Rep. 304, 42 N. W. 1109.

In such a case defendant is justified in acting upon the facts as they appear to him at the time, and is not to be judged by the facts as they actually are. *Barr v. State*, 45 Neb. 458, 63 N. W. 856; *Keep v.*

Quallman, 68 Wis. 451, 32 N. W. 233; *Kent v. Cole*, 84 Mich. 579, 48 N. W. 168; *Fosbinder v. Svitak*, 16 Neb. 499, 20 N. W. 866; *Higgins v. Minaghan*, 78 Wis. 602, 11 L.R.A. 138, 23 Am. St. Rep. 428, 47 N. W. 941; *Illinois Steel Co. v. Waznius*, 101 Ill. App. 535.

Grimson & Johnson, for respondent.

Parties to litigation are not entitled to instructions upon merely technical or ethical propositions, or upon issues not arising from the evidence. 9 Enc. Pl. & Pr. 159; *Kearney v. Wurdeman*, 33 Mo. App. 447; *State v. Reilly*, 25 N. D. 339, 141 N. W. 720.

Prejudice in or from instructions will not be presumed. It must be reasonably shown. *State v. Reilly*, supra.

As to the force that may be used to repel or resist an assault, the phrase, "reasonably necessary to defend himself," means only such force as would seem necessary to a reasonably careful man. *People v. Dollor*, 89 Cal. 513, 26 Pac. 1086.

BRUCE, J. (after stating the facts as above). The defendant and appellant complains that the instructions which were given by the court informed the jury that the measure of what constitutes a lawful resistance to an assault is "such force as is reasonably necessary to defend one's self," when under the decisions it is merely such force as "would have appeared to an ordinarily careful and prudent man to have been necessary at the time of the attack."

Generally speaking, the instructions which were given are open to this criticism, and we have no doubt held that the conduct of the person who is assailed and the amount of force which he uses is not to be judged by what is actually necessary under the circumstances, or even by what a reasonably cautious person might or might not do or consider necessary to do under like circumstances, but by what he himself in good faith honestly believes, and had reasonable ground to believe, was necessary for him to do to protect himself, and that the reasonableness of his belief must be viewed from his standpoint, and he will be justified or excused if the circumstances are sufficient to induce in him an honest and reasonable belief that such force is necessary. See *State v. Hazlet*, 16 N. D. 441, 113 N. W. 374; *Barr v. State*, 45 Neb. 458, 63 N. W. 856; *Kent v. Cole*, 84 Mich. 579, 48 N. W. 168; 5 C. J. 635.

There is, however, to be found in the testimony of the defendant in

the case at bar no claim or pretense whatever that the biting of the ear was necessary, or appeared to him to be necessary, at any time during the controversy, either to his protection from personal harm or to the protection of his property. The defendant indeed not only positively denies the biting, but positively states that at no time was he afraid or excited, and that at no time was, or did he deem, biting to be necessary. The complaint charges the biting and the biting alone, and the justifiableness of the biting is the only point in issue. The instructions could not only have in no way prejudiced the defendant, but were more favorable to him than the facts of the case warranted. They, in short, left it to the jury to say whether or not the biting was reasonably necessary, when the defendant himself admitted that it was not. We can see no prejudice to the defendant therefore in the giving of the instructions.

The judgment of the District Court is affirmed.

STATE BANK OF DRESDEN v. E. A. WADSWORTH.

(157 N. W. 701.)

Trial court — findings of — evidence — sufficient.

Evidence examined, and it is *held* that the trial court's findings are sustained thereby.

Opinion filed April 11, 1916.

From a judgment of the District Court of Cavalier County, *Kneeshaw, J.*, defendant appeals.

Affirmed.

George M. Price, for appellant.

Parol evidence is always admissible to show a consideration for a written contract, and when that consideration consists in whole or in part of a dependent contract to be performed by the other party, such contract may be shown, and the failure to perform may also be shown by parol evidence, even though such contract be in writing. 1 Greenl. Ev. § 284; 2 Jones, Ev. §§ 478, 507, pp. 1058, 1123; *DeRue v. McIntosh*, 26 S. D. 42, 127 N. W. 532; *Cobb v. Wallace*, 5 Coldw. 539, 98

Am. Dec. 435; Blossom v. Griffin, 13 N. Y. 569, 67 Am. Dec. 75; Barnett v. Pratt, 37 Neb. 349, 55 N. W. 1050; Norman v. Waite, 30 Neb. 302, 46 N. W. 639; Ferguson v. Rafferty, 128 Pa. 337, 6 L.R.A. 33, 18 Atl. 484; Hines v. Wilcox, 96 Tenn. 148, 34 L.R.A. 824, 54 Am. St. Rep. 823, 33 S. W. 914; Chapin v. Dobson, 78 N. Y. 74, 34 Am. Rep. 512; Wood Mowing & Reaping Mach. Co. v. Gaertner, 55 Mich. 453, 21 N. W. 885.

Before any party to an obligation can require another party to perform, he must fulfil all conditions precedent thereto, imposed upon himself; he must be able and offer to perform all concurrent conditions. Comp. Laws 1913, §§ 5774, 5821, 5822.

The law is that a party preventing the performance of a contract can derive no benefit from the failure of the other party to perform. In such case, there is no failure. Comp. Laws 1913, § 5822; Shelly v. Mickelson, 5 N. D. 22, 63 N. W. 210.

"A default is an omission or a neglect or failure to do something required." 13 Cyc. 759.

"A refusal of a creditor to accept performance before an offer to perform is equivalent to an offer and refusal." Comp. Laws 1913, §§ 5811, 5824; Foster County Implement Co. v. Smith, 17 N. D. 178, 115 N. W. 663; Dorsey v. Barbee, Litt. Sel. Cas. 204, 12 Am. Dec. 296.

A tender is waived when the tenderee makes any declaration which amounts to a repudiation of the contract or takes any position which would render a tender useless or unavailing, as where he expressly says he will not accept the tender, if made. 38 Cyc. 136; McPherson v. Fargo, 10 S. D. 611, 66 Am. St. Rep. 723, 74 N. W. 1057; Weinberg v. Naher, 51 Wash. 591, 22 L.R.A.(N.S.) 956, 99 Pac. 736; United States L. Ins. Co. v. Lesser, 126 Ala. 568, 28 So. 646.

W. A. McIntyre, for respondent.

An offer of performance must be free from any conditions which the creditor is not bound on his part to perform. Comp. Laws 1913, § 5809; McVeety v. Harvey Mercantile Co. 24 N. D. 245, 139 N. W. 586, Ann. Cas. 1915B, 1028.

There is no way in which a lien may be destroyed, except by tender as provided by statute. Comp. Laws 1913, §§ 5815, 5819; Kronebusch v. Raumin, 6 Dak. 243, 42 N. W. 656; Jones, Chat. Mortg. §§ 632 et seq.

A vendee to whom personal property has been transferred under an executed sale cannot maintain an action upon the implied warranty of title, nor interpose the breach of such implied warranty as defense to an action for the purchase price, in the absence of fraud, and without showing actual damage. *Hull v. Caldwell*, 3 S. D. 451, 54 N. W. 100; *Higbie v. Rogers*, — N. J. Eq. —, 48 Atl. 554; *Davis v. Burgess*, 7 Ky. L. Rep. 837.

In the case of an express warranty of title to chattels sold, a defective title cannot be set up in defense of an action for the purchase money before eviction. *Brown v. Smith*, 5 How. (Miss.) 387; *McGiffin v. Baird*, 62 N. Y. 329.

CHRISTIANSON, J. This is an action for the foreclosure of a chattel mortgage given by the defendant to one Fred Krueger, and by him assigned to the plaintiff. The complaint is in the usual form. The defendant in his answer admits the execution and delivery of the note and mortgage, and asserts as his sole defense that at the time of the execution of the note and chattel mortgage there was an agreement that if the note was paid within thirty days from its date that no interest would be charged, and that a discount of 4 per cent of the face of the note would be allowed; that the note and mortgage involved in this action were executed in payment of certain personal property purchased by the defendant from said Fred Krueger, and that said Krueger warranted the title thereto; and that at the time of such sale and for a long time thereafter, valid liens and encumbrances existed against such property, and that said Krueger did not at the time of said sale nor for a long time thereafter have a good, clear, or unencumbered title to the property sold to the defendant; that defendant executed the promissory note and chattel mortgage involved in this action without knowledge of such encumbrances. The case was tried upon the issues framed by these pleadings, and the trial court rendered a judgment in favor of the plaintiff for the full amount claimed, and decreed a foreclosure of the chattel mortgage. Defendant has appealed from this judgment, and demanded a trial *de novo* in this court.

The controlling and undisputed facts in this case are as follows: On the 16th day of October, 1911, one Fred Krueger held an auction sale of his chattels, and at such sale the defendant purchased certain chattels of

the aggregate value of \$857.50, in payment of which he executed and delivered the note and chattel mortgage involved in this action. The note was dated October 16, 1911, bore interest at the rate of 10 per cent per annum, and became due November 1, 1912. One John Terhaar, the cashier of the plaintiff, acted as clerk of the sale and prepared the note and mortgage. Shortly after the sale, the plaintiff purchased the note from Krueger, and thereby became, and since that time has been, the owner and holder thereof. At the time of the sale the defendant, Wadsworth, was told that if he paid for the chattels purchased within thirty days from the sale, he would be given a discount of 4 per cent, and no interest would be charged, and the note and mortgage would be canceled and returned to him.

At the time of the sale a chattel mortgage in favor of the Bank of Evansville, Evansville, Minnesota, which covered a portion of the chattels purchased by defendant, appeared of record. This mortgage was not released, until on the 7th of November, 1912, but it is undisputed that the note secured thereby had been fully paid on October 9, 1911. A mortgage in favor of the Rumely Company, also, appeared unsatisfied, but it is undisputed that the Rumely Company's mortgage had not only been paid, but that a release thereof had been filed in the office of the register of deeds of Cavalier county on March 23, 1911. It is therefore undisputed that Fred Krueger, at the time of the sale, had a good title to the chattels sold, free and clear of all liens and encumbrances. It is conceded that the defendant has not paid the note, and that he made no offer or tender to do so until about March 15, 1913, at which time he tendered an amount concededly considerably less than the amount due upon the note at that time, and defendant's tender was not made until after the note and mortgage had been placed in the hands of the plaintiff's attorney for foreclosure, and after plaintiff's attorney had demanded payment and threatened foreclosure proceedings unless payment was made.

The plaintiff raised no question as to the validity of the oral agreement for the allowance of a 4 per cent discount if the note was paid within thirty days after its date, but repeatedly gave defendant an opportunity to avail himself thereof, and upon the trial plaintiff conceded the existence of such agreement, and signified a willingness to abide by its terms, but plaintiff did claim that defendant, by his con-

duct and by reason of his failure to pay the note within the time agreed upon, had forfeited all right to claim the benefit of such agreement. Upon the trial defendant testified that at the time of the execution of the note and mortgage Mr. Terhaar agreed to procure releases of the mortgages appearing of record against the property purchased by the defendant, and defendant claims that by reason of this agreement he was not required to pay the note until such releases had been obtained. Mr. Terhaar denied that any such conversation took place. In this court appellant's argument is confined almost solely to the proposition that defendant was not required to pay the note until such chattel mortgages were released.

As already stated the testimony upon this question was squarely in conflict, and we do not pass upon the question whether evidence of such parole agreement was admissible; nor do we pass upon the question whether such agreement, if established, would constitute a defense. But it is sufficient to say that no such agreement was pleaded in the defendant's answer, and the evidence (even if admissible) fails to show that such agreement existed. The defense set forth in the answer to the effect that the property purchased by the defendant was encumbered was conclusively disproved upon the trial. It is undisputed that the defendant failed to pay the note within thirty days after its date, and failed to tender payment until about seventeen months after the date of the note. Under these circumstances it seems self-evident that defendant has no right to claim the benefit of the agreement for allowance of a discount. He has concededly failed to perform the condition upon which a discount would be allowed. The findings of fact of the trial court meet with our entire approval. It is inconceivable how any reasonable man could have found otherwise. Defendant has no cause to complain of the judgment, and the same must be affirmed. It is so ordered.

INDEX.

ACCEPTANCE.

Of highway, see Highways, 1.

ACCOUNT BOOKS.

Admissibility in evidence, see Evidence, 4.

Attaching book account to complaint as an exhibit, see Pleading, 6.

ACTION OR SUIT.

Costs, see Costs and Fees.

Venue of, see Venue.

Witnesses, see Witnesses.

Action by wife, see Husband and Wife.

1. Causes of action against principals and sureties on official bonds may be joined in one action, as the liability of each and all sprung from the joint acts of the principals and against whose wrongful diversion of public money the sureties have contracted to indemnify. *Stark County v. Mischel*, 432.
2. Cause of action *ex contractu* and *ex delicto* may be joined under such circumstances. *Stark County v. Mischel*, 432.
3. Under § 7966, Comp. Laws 1913, which provides that an action is deemed pending from the time of its commencement until its final determination upon appeal, or the time for appeal has passed, unless the judgment is satisfied, it is *held* that, when the time for appeal has expired the action is terminated, and the trial court has no jurisdiction to hear a motion for a new trial. *Grove v. Morris*, 31 N. D. 8; *Higgins v. Rued*, 30 N. D. 551, followed. *Garbush v. Firey*, 154.

ADMINISTRATORS. See Executors and Administrators.

ADMISSIONS.

Evidence of, see Evidence, 7.

ADVERSE POSSESSION.

1. Action to quiet title based on adverse possession against fee-title holder Smith and others: *Held*, facts are insufficient to establish a title under adverse possession as required by § 5471, Comp. Laws 1913. Page v. Smith, 369.
2. Proof of occasional or continuous cutting of hay upon wild, uncultivated, uninclosed, and unimproved prairie land is not of itself sufficient to establish that the land is held adversely to the fee owner of record. Page v. Smith, 369.
3. Payment of taxes with such insufficient occupancy does not operate to divest title of the record holder of the fee. Page v. Smith, 369.

AFFECTIONS.

Alienation of, see Evidence, 21; Husband and Wife, 1-5.

ALIENATION OF AFFECTIONS.

Action for, see Evidence, 21; Husband and Wife, 1-5.

ALTERATION OF INSTRUMENTS.

In a suit on a promissory note by a purchaser in due course before maturity and without notice of any defenses, the maker may answer and thereunder offer proof to establish that when executed and delivered the note was non-negotiable and contained no words of negotiability, but that it had been materially altered by their insertion after delivery and before its purchase; and that this alteration was made by the erasure of a line striking out all words of negotiability. *Aamoth v. Hunter*, 582.

AMENDMENT.

Of record on appeal, see Appeal and Error, 6.

Of pleading, see Pleading.

ANSWER. See Pleading.

APPEAL AND ERROR.

DECISIONS APPEALABLE.

1. Following *Stimson v. Stimson*, 30 N. D. 78, it is *held* that an order striking an amended complaint from the files is appealable. *Bergen Twp. v. Nelson County*, 247.
2. An appeal lies by a creditor or claimant from an order of the probate court settling an administrator's account. *Elton v. Lamb*, 388.

RECORD AND CASE IN APPELLATE COURT.

3. A party asserting error has the burden of proving it, and must present a record affirmatively showing such error. *Erickson v. Wiper*, 193.
4. A party predicated error on an attorney's argument to the jury must present a record affirmatively showing that objectionable language was used. *Erickson v. Wiper*, 193.
5. The statement of case as certified by the trial court imports absolute verity, and cannot be contradicted, varied, or extended in the appellate court by affidavits or other evidence *dehors* the record. *Garbush v. Firey*, 154.
6. An application to remand the record for amendment, made after a decision has been filed and while an application for rehearing is pending, will ordinarily be denied. *Garbush v. Firey*, 154.
7. Assignments of error based upon rulings in the admission and exclusion of testimony should be specific and point out the particular ruling or rulings complained of. *Erickson v. Wiper*, 193.

RAISING QUESTIONS IN LOWER COURT.

8. Following *Morris v. Minneapolis, St. P. & S. Ste. M. R. Co.* 32 N. D. 366. *Held*, that the supreme court, in law appeals, sits merely in review of errors, and where no ruling of the trial court as to the sufficiency of the evidence is invoked, either by motion for a directed verdict or for a new trial, there is nothing for this court to review. *Freerks v. Nurnberg*, 587.

TRIAL DE NOVO ON APPEAL.

See also *Fraudulent Conveyances*, 1.

9. A trial *de novo* cannot be had in the supreme court in an action properly triable to a jury, even though a jury was waived and the cause tried to the court. *Novak v. Lovin*, 424.
10. Upon a trial *de novo*, the supreme court in deciding the facts acts independently of the trial court's findings, although such findings when based 33 N. D.—42.

APPEAL AND ERROR—continued.

- upon oral testimony are of necessity entitled to and will be given some weight. *Merchants Nat. Bank v. Collard*, 556.
11. Action for specific performance, upon a trial *de novo* in the supreme court, the finding of fact of the trial court to the effect that respondent is a good-faith purchaser of the lands involved, without notice, actual or constructive, of plaintiff's alleged prior contract for the purchase thereof from the original owner, is sustained together with the conclusions and judgment pursuant thereto. *Peterson v. Dill*, 407.
 12. Action to foreclose mechanic's lien; trial *de novo*. Evidence examined, and held: That the land company was not aware of the purchase of the lumber used in improvements upon a farm sold by it under contract for deed to Stolz, until nearly a year after said improvements had been made, and further that said land company never assumed the indebtedness. The operation of the lien was therefore properly restricted to Stolz's equity in the land. *Powers Elevator Co. v. Stolz*, 628.
 13. Action to foreclose real estate mortgage. Defense: material alterations of the notes and mortgage; trial *de novo* in this court. The only question involved is whether the notes and mortgage in question were changed from \$800 to \$844.45, before or after their execution. The evidence is examined and held that the notes and mortgage in question had not been changed in any particular since their execution. *Elliott v. Clemans*, 609.

ABUSE OF DISCRETION.

14. Trial courts are vested with wide discretionary powers in the matter of granting amendments to pleadings during the trial of an action. *Kurtz v. Paulson*, 400.
15. It is not an abuse of discretion on the part of a trial judge to refuse to allow the filing of an amendment to the answer in an action on a fire insurance policy, and which amendment sets up the new defense, that the insured, in violation of the terms of the policy, failed to keep books of account of his sales and purchases, and to keep said books within an iron safe, when such motion is not made until after the close of plaintiff's testimony and neither throughout the prior negotiations for a settlement, nor in the original answer, had the defendant in any manner suggested the defense, and the trial was held at a place more than a hundred miles from the home of the plaintiff and of his attorneys, and there was no showing that, prior to the making of such motion, the defendant was not aware of the new facts sought to be pleaded. *Ennis v. Retail Merchants Asso. M. F. Ins. Co.* 20.
16. Where evidence is offered as a whole, and a part of it is inadmissible, the court is not required to separate the admissible from the inadmissible, but

APPEAL AND ERROR—continued.

- may properly reject the whole, although it may in its discretion admit such parts as are competent and reject such parts as are incompetent. *Starke v. Stewart*, 359.
17. Under the proceedings of this case set forth in the opinion, the trial court did not abuse its discretion in taxing the costs in favor of the land company. *Powers Elevator Co. v. Stolz*, 628.
 18. The question whether such bias and prejudice exist as to require a change of venue is primarily for the trial court to determine, and its discretion in such matters will not be reviewed or interfered with by the appellate court unless a manifest abuse of discretion has been committed; the burden of proof of such facts being upon the movent and appellant. *Booren v. McWilliams*, 339.
 19. Following the rule announced in *Westbrook v. Rice*, 28 N. D. 324, *held*, under the facts, that it was an abuse of discretion to deny defendant's motion to be relieved from a default taken against him through his excusable neglect in failing to appear and interpose his defense at the time the issues were set for trial. *Farmers' & M. Bank v. Mann*, 135.
 20. The granting of new trial after a verdict has been directed by the court is a matter which is largely within the discretion of the trial judge, and such discretion will not, as a rule, be interfered with, unless no conclusion can be drawn from the evidence except one favorable to the party for whom the verdict was found, and that the errors, if any, which were committed by the trial judge were clearly not prejudicial. *Knapp v. Minneapolis, St. P. & S. Ste. M. R. Co.* 291.

FIRST RAISING OBJECTIONS ON APPEAL.

21. In reviewing a ruling on a motion for nonsuit or a directed verdict, the appellate court will consider only the grounds urged in the trial court, and appellant will not be permitted to change them or to add others in the appellate court. *Erickson v. Wiper*, 193.
22. Defects in pleadings which are readily remedied will not be considered for the first time in the supreme court. *Freerks v. Nurnberg*, 587.
23. Certain errors assigned upon rulings in the admission and exclusion of evidence cannot be considered on this appeal, where the errors assigned really go to the sufficiency of the evidence to establish various elements of plaintiff's case and no request for instructions on these elements was made and the sufficiency of the evidence to sustain plaintiff's cause of action as a whole or any specific element thereof was not challenged. *Buchanan v. Occident Elev. Co.* 346.
24. Under the rule announced by this court in *Morris v. Minneapolis St. P. & S. Ste. M. R. Co.* 32 N. D. 366, the sufficiency of the evidence to support

APPEAL AND ERROR—continued.

- the verdict cannot be assailed for the first time in the supreme court, but this question must first be raised in some appropriate manner in the trial court. *Buchanan v. Occident Elev. Co.* 346.
25. The protection of the statute of frauds must be invoked in some appropriate manner in the trial court, and cannot be invoked for the first time in the appellate court. *Erickson v. Wiper*, 193.

ERRORS WAIVED OR CURED BELOW.

26. Where the trial court places a certain construction upon a complaint, and the defendant asks for and obtains leave to amend his answer to conform to the trial court's construction, and the cause is tried upon such pleadings and such theory, the defendant cannot be heard to say on appeal that the trial court's construction and rulings made prior to the amendment of the answer were erroneous. *Morris v. Occident Elev. Co.* 447.
27. The error, if any, in striking out an answer as irresponsible is cured where the witness elsewhere in his testimony has testified, or is permitted to testify, to the substance of the answer stricken. *Erickson v. Wiper*, 193.
28. The error, if any, in sustaining objections to questions propounded to a witness is cured where the witness elsewhere in his testimony is permitted to testify fully upon the matters covered by such questions. *Halverson v. Lasell*, 613.
29. A defendant who introduces evidence in the case after his motion for nonsuit is overruled, and fails to renew his motion at the close of the case, is not in position to predicate error upon the denial of the motion for nonsuit. *Buchanan v. Occident Elev. Co.* 346.

WHAT ERRORS WARRANT REVERSAL.

30. Certain rulings in the admission and exclusion of testimony examined and held correct or nonprejudicial. *Erickson v. Wiper*, 193.
31. It is held that the court's action in propounding certain questions to a witness does not constitute prejudicial error. *Buchanan v. Occident Elev. Co.* 346.
32. In an action by an attorney at law to recover on the *quantum meruit* for professional services rendered to the defendant at his request, the answer, among other defenses, alleged that a portion of such services was performed under a special contract by the terms of which plaintiff agreed to commence and to prosecute at his own cost and expense certain actions for the defendant upon a contingent fee basis, and that, in the event he should be unsuccessful, he should receive no compensation for his services. It was also alleged that he was unsuccessful in such litigation. At the

APPEAL AND ERROR—continued.

- trial such defense was, on plaintiff's motion, stricken from the answer, and proof of the matters thus pleaded was offered and rejected. *Held*, that such rulings constituted prejudicial error. *Freerks v. Nurnberg*, 587.
33. It is *held* that, for reasons stated in the opinion, the court erred in excluding a certain chattel mortgage offered in evidence by the defendant. *Kurtz v. Paulson*, 400.
34. This case is governed by *Lee v. Imperial Elevator Co.* 34 N. D. 1, just decided by this court. In this case, however, exception is taken to the remarks of one of the counsel for plaintiff, who asserted that it was the policy of corporations to fight claims of this class, whether right or wrong. The court immediately admonished the jury that there was no evidence supporting such statement and to disregard the same. *Held* that the incident was without prejudicial error. *Lee v. St. Anthony & D. Elev. Co.* 567.
35. Certain instructions to the jury considered and *held* nonprejudicial. *Buchanan v. Occident Elev. Co.* 346.
36. Certain instructions to the jury considered and *held* nonprejudicial. *Halverson v. Lasell*, 613.
37. Where a complaint charges the defendant with maliciously biting off a portion of the ear of the plaintiff, and the defendant himself testifies that such biting was not necessary to his protection from the assault of the plaintiff and that at no time during said assault did he consider it to be necessary, no prejudice can be assumed to have followed from an instruction which tells the jury that a person who is assaulted by another is justified in using "such force as is reasonably necessary to defend himself." *McLean v. Foisie*, 646.

JUDGMENT ON APPEAL.

38. No finding having been made upon the controlling issue as to the alleged forgery of the payee's signature to a certain instrument, the cause is remanded for a new trial on that issue. *Novak v. Lovin*, 424.
39. Although, on the reversal by the supreme court of a judgment notwithstanding the verdict, the cause will be remanded to the district court with leave to the respondent to perfect a motion for a new trial in cases where he asked for a new trial in the alternative and in connection with the motion for a judgment notwithstanding the verdict, and it is apparent that error was committed on the trial which would justify the granting of such new trial, no such leave will be granted when it is apparent that no error was committed. *Ennis v. Retail Merchants Asso. M. F. Ins. Co.* 20.
40. Where upon the trial the court refuses to permit an amendment to the answer which sets up a defense, which, under the peculiar facts of the

APPEAL AND ERROR—continued.

case, is purely technical and at the close of the trial the judge sets aside a verdict for the plaintiff, and allows such amendment, and orders a judgment entered for the defendant notwithstanding such verdict and notwithstanding the fact that the evidence in support of the amendment was objected to, the supreme court, if it reverses such judgment notwithstanding the verdict on an appeal taken, will take into consideration the technical nature of the defense in determining whether the cause should be remanded to the district court with leave to perfect the motion for a new trial and in order that such defense may be pleaded and interposed, and whether the remanding of the cause for such purpose would be in furtherance of justice. *Ennis v. Retail Merchants Asso. M. F. Ins. Co.* 20.

41. As this appeal determines two actions, the judgments appealed from are ordered set aside and new trials are granted, with plaintiff's costs to be taxed against the intervener. The elevator companies being mere stockholders, no costs will be taxed against them. *State Bk. v. Hurley Farmers Elev. Co.* 272.

APPELLATE COURT.

Original jurisdiction of, *see* Courts, 3-5.

APPROPRIATION.

Of public moneys, *see* Public Moneys.

ASSAULT.

Instructions in action for, *see* Appeal and Error, 37.

ASSESSMENTS.

For public improvements, *see* Public Improvements.

ASSIGNMENTS OF ERROR.

On appeal, *see* Appeal and Error, 7.

ASSUMPSIT.

When a person against whom a judgment is illegally though not fraudulently obtained for the foreclosure of land of which he has the possession, and who has an opportunity to move for a vacation of the judgment or to appeal, writes to his agents to pay the claim, stating that he is "desirous of taking no chances as to the determination of his rights," and there is no proof either of a mistake of law or of fact on his part, and the only

ASSUMPSIT—continued.

duress is the threatened mortgage sale, such a payment will be deemed voluntary and cannot be recovered. *Gold-Stabeck Loan & C. Co. v. Kinney*, 495.

ATTORNEYS.

Argument or remarks of, see Appeal and Error, 4, 34.

Suit to recover on *quantum meruit* for services, see Appeal and Error, 32.

BANKRUPTCY.

Admissibility in evidence of schedules in bankruptcy, see Evidence, 3.

Burden of proof as to preferences, see Evidence, 20.

1. Bankruptcy or insolvency at the time of the conveyance is not necessary in order to prove a transfer fraudulent and made for the purpose of hindering and delaying the creditors, so as to entitle the trustee in bankruptcy to a recovery of the property provided there is fraud, and an intent to delay and defraud the creditors, and such fraud and intention is known to the grantee. *Buttz v. James*, 162.
2. Property transferred by the bankrupt in fraud of his creditors passes to the trustee in bankruptcy, who takes title for the purposes of his trust. *Buttz v. James*, 162.

BANKS.

Officer's liability on bond for loss of public money through bank failure, see Bonds.

1. Action by minority stockholder to enjoin the directors of two affiliated banking institutions from proceeding with the erection of a five-story, fire-proof building upon the grounds that the investment exceeds 30 per cent of their capital stock and unimpaired surplus as prescribed by § 5151, Comp. Laws 1913. *Sarles v. Scandinavian American Bank & N. W. T. Co.* 40.
2. Section 5151, Comp. Laws 1913, does not prohibit the use of the undivided profits in the aid of the 30 per cent of the capital stock and unimpaired surplus for the erection of a banking building. *Sarles v. Scandinavian American Bank & N. W. T. Co.* 40.

BIAS.

Change of venue because of, see Venue.

BILLS AND NOTES.

Alteration of, see Alteration of Instruments.

Validity of agreement by layman to collect or settle note, see Contracts, 3.

Usury in, see Usury.

1. An instrument payable to a person named, omitting "the order of," or words of negotiability of similar import, is non-negotiable under the uniform negotiable instruments act, as declared by § 6893, Comp. Laws 1913. *Aamoth v. Hunter*, 582.
2. In an action by an administrator to recover on certain promissory notes executed and delivered to the intestate by defendants, the defense was that the notes were given pursuant to the terms of the following written instrument:

Voss, N. D., Dec. 22, 1897.

- I, Barbara Mikesch, being desirous of placing some moneys with my daughter and son-in-law, Mary E. and J. H. Lovin, which I wish to save for my declining years, I agree to place said moneys with them on the following conditions: That I accept such note or notes for said moneys and such rate of interest as the said Mary E. and J. H. Lovin see fit to give me, and son-in-law, Mary E. and J. H. Lovin, which I wish to save for my shall be non-transferable and shall be payable to no one but myself, and that in case I should die while said notes are in force they shall at once become null and void and not collectable.

(Signed) Barbara Mikesch.

Held, for reasons stated, that such instrument is not testamentary in character, and if the signature thereto is genuine, the defense relied on is complete. *Novak v. Lovin*, 424.

BOARD OF DRAIN COMMISSIONERS. See Drains and Sewers.

BONDS.

Joining causes of action against principal and sureties on, see Action or Suit, 1.

Establishment of fund for bonding of municipal officers, see Constitutional Law, 2, 7.

Action on bond of officer, see also Officers.

1. Action at law to recover of the Rugby School District treasurer and sureties on his official bond for a balance of \$2,521 and interest, lost by the district through the failure of its depositary, the defunct First National Bank of

BONDS—continued.

- Rugby. *Held*: That the treasurer in depositing the school funds therein upon order of the district board, and in compliance with the statutes, is not liable upon his official bond where the school funds are lost to the district. *Board of Education v. Nelson*, 462.
2. The designation of depositaries, and requiring of bonds from them, was the duty and province of the school board, not the treasurer. *Board of Education v. Nelson*, 462.
 3. Under the record the treasurer was justified in assuming that the board had complied with the law in the designating of depositaries, and had exacted sufficient depositary bonds. *Board of Education v. Nelson*, 462.
 4. The original designation of depositaries in 1905 was sufficient to continue said bank as a legal depositary and without a redesignation in July, 1907. *Board of Education v. Nelson*, 462.
 5. The loss arises principally from the deposit of a sinking fund as to which the school board is empowered to order a deposit to be made in any depositary therefor and, which depositary may be designated after advertisement and at any time. The treasurer had the right to rely upon the presumption that said bank had been designated as a depositary for such funds. *Board of Education v. Nelson*, 462.
 6. School treasurers have not the control of the district funds except in a limited way for the purpose of depositing them in depositaries selected by the board. The authority over school funds is with the district board since the enactment of depositary statutes; and since which time the treasurer is no longer an insurer of the return of school funds to the district after their deposit as provided by law. The facts exonerate the treasurer and his bondsmen from liability. *Board of Education v. Nelson*, 462.

BROKERS.

Evidence in action for commissions, see *Evidence*, 7.

Instructions in action for commissions, see *Trial*, 11.

- A broker employed to sell land for a specific price, and who has agreed with his principal that he shall receive a dollar an acre commission provided that he sells at such price, does not perform his engagement so as to be entitled to recover such commission in a suit upon such contract, by producing a purchaser who is not willing to pay the price named, and even though the owner thereafter sells the land to such purchaser at a lower price, and where there is no proof that the owner did not act in good faith or that he prevented the broker from performing his contract. *Grangaard v. Betzina*, 267.

BURDEN OF PROOF. See Evidence, 1, 2.

BURIAL EXPENSES. See Executors and Administrators.

CARRIERS.

1. Where the freight rate from a certain point which lies beyond the terminus of a railroad company and across a lake to certain points upon the line of the railway is advertised in the tariffs of the company as being 22 cents per one hundred pounds, such freight being usually transported across the lake on the boats or barges of an independent company to the point of beginning of said railway company, and the rate from such terminal point to the points of destination being advertised as 17 cents, it is within the ostensible authority of a general agent of such railway company who prior to such time has induced the plaintiff to lease elevators across said lake, telling him that he could have a 22-cent rate from such point, and who prior to such time negotiated with the boat company to the end that the proper transportation could be furnished to such point, after the lake has frozen up and it is impossible to transport the grain by said barges or boats and after a 22-cent rate has been given to such plaintiff, to agree with such plaintiff that, if he will haul the grain to the railway station himself for further transportation, the company will pay him 5 cents per bushel for such hauling. *Knapp v. Minneapolis, St. P. & S. Ste. M. R. Co.* 291.
2. Where a railway company has a station on the shores of a lake, and across said lake are grain elevators from which it has been the custom of the company to give a rate of 22 cents per hundred pounds to terminal points upon its line within another state, it being the custom to transport the grain across said lake upon the boats of an independent company, and when the railway company has given to the owner of such elevators such 22-cent rate, and agreed to transport the grain from such elevators to the points of destination for the said sum, but later, on account of the freezing of the waters of the lake, it becomes impossible to operate the boats, it is not a violation of § 6 of the interstate commerce act of June 29, 1906 (34 Stat. at L. 587, Comp. Stat. 1913, § 8597), which prohibits unlawful discrimination, for such railway company to agree with the shipper that if he himself will haul the grain across the lake to the station of the company it will pay to such shipper 5 cents a bushel for such hauling, and the court will not hold such allowance of 5 cents per bushel to be unreasonable, in the absence of proof or of a ruling of the Interstate Commerce Commission to that effect. *Knapp v. Minneapolis, St. P. & S. Ste. M. R. Co.* 291.

CHAMPERTY.

Champertous contract, see Contracts, 3.

CHANGE OF VENUE. See Venue.**CHATTEL MORTGAGE.**

On grain, see Trover and Conversion.

CLAIM AND DELIVERY. See Replevin.**CLOUD ON TITLE.**

Title is quieted in the fee holder, Smith, upon condition that he pay the mortgage indebtedness, including interest, also taxes paid by the original mortgagee and assigns and interest thereon, and provided also that an accounting thereon may be had upon the value of the use and occupation of the premises during Smith's ownership to date of judgment as an offset against such taxes and mortgage indebtedness. Costs to appellant. Case remanded for further proceedings if necessary. Page v. Smith, 369.

COMITY. See Conflict of Laws.**COMMERCE.**

Violation of interstate commerce act prohibiting discrimination by carriers, see Carriers, 2.

COMMISSIONERS.

Drain commissioners, see Drains and Sewers.

Insurance commissioners, see Insurance.

Park commission, see Park Commission.

COMMISSIONS.

Of broker, see Brokers.

COMMON CARRIERS. See Carriers.**COMPLAINT.**

Of plaintiff, see Pleading, 4-8.

CONFLICT OF LAWS.

A mortgage made by a resident of Wisconsin to a resident of Minnesota and to secure a debt which is payable in Minnesota is, as far as the defense of usury is concerned, governed by the laws of Minnesota even though the land is situated in North Dakota. *Gold-Stabeck Loan & C. Co. v. Kinney*, 495.

CONSIDERATION.

Parol evidence to show, see *Evidence*, 5, 6.

CONSTITUTIONAL LAW.

Relation of courts to other departments of government, see *Courts*, 1, 2.

Who may question constitutionality of statute, see *Statutes*, 3.

DELEGATION OF POWER.

See also *Taxes*, 3.

1. Chapter 62, Laws 1915, is not invalid on account of delegating legislative power to the commissioner of insurance and state auditing board. *State ex rel. Linde v. Taylor*, 76.
2. Chapter 62 of the Laws of 1915, establishing a state bonding fund for the purpose of furnishing official bonds for county, city, village, school district, and township officers is not unconstitutional, as conferring judicial powers on the state examiner and commissioner of insurance. *State ex rel. Linde v. Taylor*, 76.

LOCAL SELF GOVERNMENT.

3. Chapter 62, Laws 1915 does not violate any express or implied constitutional guaranty of the right of local self-government. *State ex rel. Linde v. Taylor*, 76.

DUE PROCESS OF LAW.

4. Subdivision 14, § 2088, Comp. Laws 1913 is unconstitutional as violative of due process of law, because no procedure is provided by law governing the exercise of taxing powers in assessing under said act; and—because no opportunity under any law is afforded for a hearing for the property owner to be assessed. He has no opportunity for redress, relief, or correction of error in any erroneous assessment that this Commission might

CONSTITUTIONAL LAW—continued.

- levy; and such unrestricted power of taxation may amount to confiscation of, or its deprivation of, property without due process of law. *State ex rel. Miller v. Leech*, 513.
5. That the Tax Commission is by statute required to be in session at the state capitol on all business days does not save the statute from being unconstitutional on said ground. The party assessed is entitled to an opportunity to be heard under the law authorizing him to be taxed. No burden is upon him to apply to be heard where the law does not provide for a hearing for him. Nor that he could have been afforded an extra-legal hearing had he applied for relief against an excessive assessment is of no avail. To be valid the statute must provide for and designate the time and place for opportunity to so be heard that the property holder to be assessed, having notice and knowledge of the law, may appear and be heard or be bound by his failure so to do. *State ex rel. Miller v. Leech*, 513.
6. Where no right to such a hearing, before the assessment becomes absolute, is afforded by the law to the party assessed, the tax proceeding and law authorizing it is arbitrary and invalid as contrary to constitutional guaranties against the deprivation of private property without due process of law. *State ex rel. Miller v. Leech*, 513.

POLICE POWER.

7. The establishment and operation of a fund for the bonding of municipal officers and the collection of premiums from the various municipalities whose officers are bonded for the purpose of creating a fund to secure the payment of losses which may result by reason of the nonfeasance, misfeasance, or defalcation of such public officers, is a valid exercise of the police power of the state. *State ex rel. Linde v. Taylor*, 76.

CONSTRUCTION.

- Of contract, see *Contracts*, 2.
 Of complaint, see *Pleading*, 4, 5.
 Of statutes, see *Statutes*, 1, 2.

CONTRACTS.

- Joining cause of action *ex contractu* with one *ex delicto*, see *Action or Suit*, 1.
 Specific performance of, see *Specific Performance*.
 Usury in, see *Usury*.

CONTRACTS—continued.

STATUTE OF FRAUDS.

Invoking statute of frauds for first time on appeal, see Appeal and Error, 25.

1. The statute of frauds has no application where there has been a full and complete performance of the agreement by one of the contracting parties, and acceptance of such performance by the other party, and the part remaining to be performed is merely the payment of money. *Erickson v. Wiper*, 193.

CONSTRUCTION.

2. Where parties by correspondence agree to certain changes in the terms of a prior written contract, the agreement between the parties will be gathered from the written contract and the correspondence considered as a whole. *Orfield v. Harney*, 568.

VALIDITY.

3. A good-faith agreement by a layman to collect, compromise, or settle a promissory note in consideration of a certain percentage of the amount collected or recovered, is not *per se* void on the ground of champerty or public policy. *Rohan v. Johnson*, 179.

RESCISSION.

4. Action in equity to rescind an executed sale of a half interest in a mercantile corporation for the purchase of which plaintiff had deeded a half section of land, and to cancel deed or compel reconveyance. In February, 1911, plaintiffs purchased, and later, in April, took possession of the mercantile business, managing it until November, when the store building and stock of merchandise were totally destroyed by fire. Fourteen thousand, seven hundred dollars insurance was collected and disbursed in payment of creditors, not paying the corporate debts in full. The business was closed out. While they were running the store, goods were bought and sold. A portion of the stock had been removed to start a branch store, for which corporate debts had been incurred. In July, 1912, a year and a half after the sale, plaintiffs served notice of rescission of the contract on the ground of fraudulent misrepresentations made by and inducing their purchase, claiming that, unknown to plaintiffs, the corporation had been insolvent

CONTRACTS—continued.

when they bought their half interest in it. *Held*: It was impossible to place the parties in approximately the *status quo* at the time of the sale on account of the destruction of the business by fire and the disbursement of the assets. This coupled with long delay in attempted rescission prevents any rescission. Plaintiffs cannot maintain an action to cancel the deeds or compel reconveyance of the real estate, but must be left to an action for damages. *Rosenwater v. Selleseth*, 254.

CONTRIBUTORY NEGLIGENCE.

Of person injured on defective highway, see *Highway*, 2-4.

CONVERSION. See *Trover and Conversion*.**CORPORATIONS.**

As to banks, see *Banks*.

COSTS AND FEES.

Review of discretionary rulings as to, see *Appeal and Error*, 17.

Under § 7794, Comp. Laws 1913, the plaintiff was entitled to costs in district court. *Paulson v. Sorenson*, 488.

COUNTIES.

Officers of, see also *Officers*.

Levy of tax by county commissioners, see *Taxes*, 1.

Settlement between an embezzling treasurer and the county commissioners, obtained by concealment of the embezzlement, is not binding upon the county. *Northern Trust Co. v. First Nat. Bank*, 1.

COURTS.

Review by, of decision of board of drain commissioners, see *Drains and Sewers*, 2.

RELATION TO OTHER DEPARTMENTS OF GOVERNMENT.

1. Courts are not at liberty to declare a law void as in violation of public policy. Such policy is determined by the legislature, and the only limits upon the legislative power in such determination are those fixed in the state and Federal Constitutions. *State ex rel. Linde v. Taylor*, 76.

COURTS—continued.

2. The wisdom, necessity, or expediency of legislation are matters for legislative, and not judicial, consideration. *State ex rel. Linde v. Taylor*, 76.

ORIGINAL JURISDICTION OF APPELLATE COURT.

3. In an original proceeding in the supreme court, the state is the actual plaintiff, and the relator, a mere incident. *State ex rel. Linde v. Taylor*, 76.
4. The prerogative jurisdiction of the supreme court may be exercised only in cases wherein the questions involved are *publici juris*, and the sovereignty of the state, or its franchises or prerogatives, or the liberties of its people, are affected; and this jurisdiction cannot be exercised to vindicate or protect mere private rights regardless of their importance. *State ex rel. Linde v. Taylor*, 76.
5. In an original proceeding in the supreme court, wherein a law is assailed as being unconstitutional, the court will not anticipate conditions which may never arise, or determine questions relating to the validity of minor provisions as to detail, but will consider only those questions which relate to the validity of the whole act. *State ex rel. Linde v. Taylor*, 76.

RULES OF DECISION.

6. Our usury statute was adopted from the national banking act governing taking of interest and discount by national banks, exempt in such respect from state laws; and was adopted to secure uniformity as to all banks, state and national, as to usury and penalty therefor. Federal decisions on usury are followed. *Person v. Mattson*, 49.

CRIMINAL LAW.

As to indictment, see Indictment.

1. Prosecution under a statute making guilty of misdemeanor anyone committing acts which openly outrage public decency must be for acts constituting no other crime defined by the Penal Code. *State v. Stevens*, 540.
2. The word "openly" as used in said statute, requiring that to be prosecuted thereunder the acts must "openly outrage public decency," is a part of the statutory definition, and to constitute said crime the act must be openly done, instead of secretly with the public excluded from observing it. *State v. Stevens*, 540.

CROSS-EXAMINATION.

Of witness, see Witnesses, 2, 3.

DAMAGES.

Allegation as to, see Pleading, 7.

Plaintiff was the owner of some flax; defendant owned a threshing machine. There was a contract between the parties the terms of which are in dispute. Plaintiff claims that the threshing was to be done at a certain time, and defendant claims at another time. When defendant refused to thresh at the time contended for by plaintiff, the latter stacked the grain. This suit claims damages upon two items: First, \$125,—the expense of stacking; and, second, a drop of 30 cents in the market price of the flax. The case was tried to a jury, who found for the plaintiff in the sum of \$25. The trial court taxed costs in favor of the defendant. Plaintiff appeals, demanding a new trial upon the grounds that the evidence is insufficient to support his verdict, and also assigns error upon the taxation of costs against him. Upon an examination of the evidence it is *held* that plaintiff is not entitled to more than the \$25 judgment. In the absence of appeal by the defendant, the verdict will stand. *Paulson v. Sorenson*, 488.

DEBTOR AND CREDITOR.

Bankruptcy of debtor, see Bankruptcy.

Creditors of decedent, see Executors and Administrators.

Conveyance fraudulent as to creditor, see Fraudulent Conveyances.

DEBTS.

Of school district, see Schools.

DECEDENT.

Administration of estate of, see Executors and Administrators.

DECENCY.

Prosecution for outraging public decency, see Criminal Law.

DECLARATIONS.

Admissibility in evidence, see Evidence, 8.

In pleadings, see Pleading, 4-8.

DEEDS.

Cancellation of, see Contracts, 4.

Estoppel by, see Estoppel, 1.

Parol evidence to show consideration, see Evidence, 6.

33 N. D.—43.

DEFENSE.

In mandamus proceedings, *see* Mandamus, 2.

Who may raise defense of usury, *see* Usury, 11.

DELEGATION OF POWER.

Constitutionality of, *see* Constitutional Law, 1, 2.

DEMURRER.

To criminal information, *see* Indictment.

In general, *see* Pleading, 14.

DENIALS.

In pleading, *see* Pleading, 9.

DEPOSITORY.

Bond by, *see* Bonds, 2, 3.

DEPUTY SHERIFF.

See Sheriff.

DETINUE.

See Replevin.

DIRECTION OF VERDICT. *See* Trial, 6-9.**DISCRETION.**

Review of, on appeal, *see* Appeal and Error, 14-20.

As to levy of tax, *see* Taxes, 1.

DISCRIMINATION.

By carriers, *see* Carriers, 2.

DIVERSIFIED FARMING.

Taxes to promote, *see* Taxes, 1-3.

DOCUMENTARY EVIDENCE.

See Evidence, 3, 4.

DRAIN COMMISSIONERS. See Drains and Sewers.

DRAINS AND SEWERS.

1. The board of drain commissioners is the tribunal created by the legislature to determine, upon petition and pursuant to notice, whether the public good requires a proposed drain to be constructed, and whether the cost of construction will exceed the amount of benefits to be derived therefrom; and also to determine what lands are benefited by the construction of the drain, and to apportion the cost thereof according to benefits. *Bergen Twp. v. Nelson County*, 247.
2. When the board of drain commissioners have, in all things, proceeded in accordance with the statutory requirements, their action is final, and the courts will not inquire into the correctness of their determination upon questions within their jurisdiction, unless such determination is assailed for fraud, or other ground for equitable interference. *Bergen Twp. v. Nelson County*, 247.

DUE PROCESS OF LAW. See Constitutional Law, 4-6.

EMBEZZLEMENT.

By county treasurer, see Counties.

EQUITABLE ESTOPPEL. See Estoppel.

EQUITY.

As to specific performance of contracts, see Specific Performance.

A court of equity may retain jurisdiction of an action in specific performance and enforce compliance with its decree. *Orfield v. Harney*, 568.

ERROR.

As to appellate review in general, see Appeal and Error.

ESTOPPEL.

Necessity of pleading defense of estoppel, see Pleading, 11.

1. An equitable estoppel by deed or *in pais* is not created or enforceable unless there has been a change in the situation of one of the parties in reliance on the deed or statements; and the party setting up the estoppel must show that he will be subjected to a loss if he cannot set up the estoppel. *Erickson v. Wiper*, 193.

ESTOPPEL—continued.

2. Under § 6854, Comp. Laws 1913, which gives a thresher a lien upon the grain threshed "upon filing the statement provided for in the next section," and under the next section (§ 6855) which provides that such statement may be filed within thirty days after the completion of the work, it is held that a thresher who, before the filing of any such statement, goes with the owner of the grain to the elevator and stands by and remains silent while such owner sells the grain and receives payment therefor, is afterwards estopped from asserting any such lien against such elevator company. *Branthover v. Monarch Elev. Co.* 454.

EVIDENCE.

- Review of discretionary rulings as to, see Appeal and Error, 17.
First objecting to, on appeal, see Appeal and Error, 23, 24.
Prejudicial error as to, see Appeal and Error, 30-33.
Sufficiency of evidence to go to jury, see Trial, 3-5.

PRESUMPTIONS AND BURDEN OF PROOF.

1. In an action to recover upon an account for the value of goods sold, wherein the allegations of the complaint are all put in issue by denials in the answer, the plaintiff has the burden of proof and must prove every allegation in his complaint essential to his cause of action. *Starke v. Stewart*, 359.
2. In an action to recover the price or value of goods sold, the burden is on the plaintiff to prove, among other things, the existence and validity of the contract of sale, and the terms thereof, the price or value, the delivery and acceptance of the goods, and the amount thereof. *Morris v. Occident Elev. Co.* 447.

DOCUMENTARY EVIDENCE.

3. When adjudication in bankruptcy has been had, the schedules in bankruptcy are competent evidence, both as against those holding under an unlawful preference and those holding by fraudulent conveyances. *Buttz v. James*, 162.
4. Certain books kept by the defaulting treasurer through a deputy, showing the true condition of the county cash, proved by competent testimony to be accurate at the time they were made and without which the true condition of the county cash could not be ascertained, are admissible as evidence in an action of this kind. *Northern Trust Co. v. First Nat. Bank*, 1.

EVIDENCE—continued.

PAROL EVIDENCE CONCERNING WRITINGS.

5. A parol contemporaneous agreement which constituted the inducing cause of a written contract, or formed a part of the consideration therefor, is generally admissible in evidence. *Erickson v. Wiper*, 193.
6. The clause in a deed acknowledging receipt of a certain sum of money as consideration therefor is not conclusive, but is open to explanation or contradiction by parol proof. *Erickson v. Wiper*, 193.

ADMISSIONS.

7. A certain letter written by defendant in a suit for commissions for furnishing purchaser for real estate to a banker, containing statements inconsistent with his present theory of the commission contract, was properly received as an admission against interest. *Paulson v. Reeds*, 141.

DECLARATIONS; HEARSAY.

8. There was no error in excluding a conversation between defendant and one F. at which plaintiff was not present. *Barkley v. Quick*, 124.

RELEVANCY AND MATERIALITY.

9. It was not error to allow defendant, the cashier of a bank, to show that the transactions in question were those of the bank, and not personal transactions. *Boelter v. Christ*, 331.
10. Under the pleadings and the proof in an action involving respective rights of landlord and tenant in grain grown on the leased property the excluded testimony was admissible (a) on whether the landlord had not waived any lien he may have claimed upon the tenant's share for advances; and (b) as bearing upon the intent with which the division was made and acts subsequent thereto were permitted by the landlord, and (c) as proper proof under the pleadings and the issues involved as to the amount the tenant was owing the intervener if he owed him anything at all. *State Bk. v. Hurley Farmers Elev. Co.* 272.

WEIGHT AND SUFFICIENCY.

Assailing sufficiency of evidence to support verdict for first time on appeal, see Appeal and Error, 24.

11. Evidence examined, and it is *held* that the trial court's findings are sustained thereby. *State Bank of Dresden v. Wadsworth*, 649.

EVIDENCE—continued.

12. Evidence considered and *held* sufficient to justify a finding that defendant was the owner of, and able to convey, real property. *Orfield v. Harney*, 568.
13. Evidence examined and *held* sufficient to justify a finding by the jury that the funds claimed by plaintiff never belonged to her, but at all times had been the property of her husband. *Boelter v. Christ*, 331.
14. Suit upon a note given in part payment of corporate stock. Defense was failure of consideration. Evidence examined, and held not to support the verdict rendered by the jury in favor of the defendant. For this reason the trial court should have allowed plaintiff's motion for a new trial. *Northwestern Trust Co. v. Fox*, 482.
15. The contention that Emma Collard, one of the vendors, is entitled to enforce a certain option contract to repurchase the property, *held* not supported by the proof. *Merchants Nat. Bank v. Collard*, 556.
16. Where in an action for the recovery of a general balance upon a book account upon which a payment is admitted, the full balance cannot be recovered without proof of all of the items of debt. *Tolerton & W. Co. v. Sult*, 283.
17. Action by a surety to compel restitution of county funds paid by the treasurer to defendant upon a private indebtedness. Evidence examined and found to sustain the holding of the trial court that said treasurer was short in his accounts at the time of the issuance of each and every one of the checks in question; that the issuance of each of said checks created a shortage to the damage of said county; that, the money used by said treasurer to pay his private indebtedness was at all times the money of said county. *Northern Trust Co. v. First Nat. Bank*, 1.
18. Evidence examined and found to sustain the holding of the trial court that said shortage was never even temporarily made good; that the treasurer deceived the county commissioners and the public examiner, through books which did not show the timely receipt of moneys coming into his hands as county treasurer; said books further showing the payment of funds to certain school districts, which payments were not, in fact, made. *Northern Trust Co. v. First Nat. Bank*, 1.
19. Evidence examined and, *held*, that the sale of a certain lot by two affiliated banking institutions to one Reid is bona fide. *Sarles v. Scandinavian American Bank & N. W. T. Co.* 40.
20. Even though a conveyance of real estate may not be void as an unlawful preference under the provisions of § 60a of the national bankruptcy act (act of July 1, 1898, 30 Stat. at L. 562, chap. 541), which, though recorded within four months of the filing of the petition in bankruptcy, is executed and delivered some three weeks prior to the beginning of such four months' period, and where immediately upon such delivery the grantee entered into open, notorious and hostile possession thereof, and on this question the court expresses no opinion but leaves it to the Federal courts

EVIDENCE—continued.

to decide, the burden of proof, of showing this fact, is upon the grantee of the property, and the burden is not met by proof merely that a part of the land was cultivated by such grantee and another part farmed by some third party, there being no showing as to whether such third party held under a lease or not, or under whose authority or possession he farmed the same, and nothing is shown as to the use of the balance of the land, and where the land as a whole is admitted to be in several tracts, and to be distant some miles from the place of residence of the grantee. *Buttz v. James*, 162.

21. Direct proof of illicit relations in an action for alienation of affections is not required, circumstantial evidence being sufficient. *Rott v. Goehring*, 413.

EXAMINATION.

Of witness, see *Witnesses*.

EXECUTORS AND ADMINISTRATORS.

Appeal from order settling administrator's accounts, see *Appeal and Error*, 2.

Action by administrator on promissory note given to intestate, see *Bills and Notes*.

1. Funeral and burial expenses of a decedent are a charge against his estate that must be paid next in order of preference to administration expenses, and its payment cannot be disallowed, neglected, or refused by the administrator because the funds of the estate have been used in payment of claims subordinate thereto in the order of preference declared by § 8755, *Comp. Laws 1913*. *Elton v. Lamb*, 388.
2. Where to enforce payment of funeral charges it was necessary to sue on them, and with which another cause of action upon a nonpreferred claim was joined, and a judgment was procured and entered for the aggregate amount of both claims, the preference in rank of payment in favor of the funeral charges is not lost, and preference is to be given to that portion of the judgment based upon the cause of action for funeral expenses, where the order for judgment separately stated the amounts due upon each cause of action. It was the duty of the administrator to disclose, and the probate court to ascertain, nonpayment of the charge for funeral expenses. *Elton v. Lamb*, 388.
3. Exception taken to the payment made of a \$36 item of indebtedness owing by decedent, and for which no claim had been filed with the administrator is also sustained. Exceptions to all other items overruled, except that all disbursements other than for administration expenses are subordi-

EXECUTORS AND ADMINISTRATORS—continued.

- nate in rank as to preference to said funeral charges; and payment of them without payment of the funeral charges renders the administrator liable for the latter if the estate is wholly disbursed. *Elton v. Lamb*, 388.
4. District court will direct judgment to be entered in probate court accordingly, vacating the order settling the final account of the administrator and ordering payment by the administrator of the charge for funeral expenses and costs of probate, district court and appeal costs. *Elton v. Lamb*, 388.

EXHIBITS.

With pleadings, see Pleading, 6.

FARMING.

Tax to promote diversified farming, see Taxes, 1-3.

FINDINGS.

By referee, see References.

FIRE INSURANCE. See Insurance.

FORECLOSURE.

Of mortgage, see Mortgage.

FORFEITURE.

Of interest because of usury, see Usury, 6-8.

FRAUD AND DECEIT.

As to fraudulent conveyances, see Fraudulent Conveyances.
Sufficiency of allegations as to, see Pleading, 8.

FRAUDULENT CONVEYANCES.

By bankrupt, see Bankruptcy.

1. In an action by a creditor of a vendor to set aside alleged fraudulent conveyances of real property upon the ground that such conveyances were made with intent to hinder, delay, and defraud such creditor, the trial court found adversely to plaintiff's contention, and upon a trial *de novo* in the supreme court the findings of fact as well as the conclusions of law of the lower court are in all things sustained. *Merchants Nat. Bank v. Collard*, 556.

FRAUDULENT CONVEYANCES—continued.

2. The record discloses by a fair preponderance of the evidence that there was no intent on the part of either the vendors or vendees to hinder, delay, or defraud any of the vendor's creditors. In the light of such facts the case of *Paulson v. Ward*, 4 N. D. 100, and other similar holdings cited by appellant, are held in no way applicable to the case at bar. *Merchants Nat. Bank v. Collard*, 556.
3. Following *Lockren v. Rustan*, 9 N. D. 43, held, that defendant Fried being a creditor of the vendors, and taking the conveyances in payment of claims held by him, occupies a more favorable position than a mere volunteer purchaser, and the law would not charge him with fraud, even if to his knowledge the vendors were actuated by such fraudulent intent. *Merchants Nat. Bank v. Collard*, 556.
4. The appellant's contention that the conveyances should be adjudged to be fraudulent and void because of certain alleged fraudulent averments contained in the answer of the respondents, to the effect that they are owners in fee of the lands, and that the vendors have no interest in or lien thereon, is, for reasons stated in the opinion, held untenable. *Merchants Nat. Bank v. Collard*, 556.
5. Following *Drinkwater v. Pake*, ante, it is held that under the provisions of § 7221, Compiled Laws every sale made by a vendor of personal property in his possession or under his control, unless accompanied by an immediate delivery and followed by an actual and continued change of possession of the property sold, is presumed to be fraudulent and void as against creditors of the vendor, unless those claiming under the sale make it appear that the same was made in good faith and without any intent to hinder, delay, or defraud such creditors. *Moores v. Tomlinson*, 638.
6. Under the provisions of § 7221, Compiled Laws, every sale made by a vendor of personal property in his possession or under his control, unless accompanied by an immediate delivery and followed by an actual and continued change of possession of the property sold, is presumed to be fraudulent and void as against creditors of the vendor, unless those claiming under the sale make it appear that the same was made in good faith and without any intent to hinder, delay or defraud such creditors. *Drinkwater v. Pake*, 190.

FREIGHT CARRIERS. See Carriers.

FUNERAL EXPENSES. See Executors and Administrators.

GRAIN.

Conversion of, see Trover and Conversion.

HARMLESS ERROR.

See Appeal and Error, 30-37.

HEARING.

Necessity of, to constitute due process of law, see Constitutional Law, 4-6.

HEARSAY EVIDENCE. See Evidence, 8.**HIGHWAYS.**

Improvement of, see Public Improvements.

ACCEPTANCE OF.

1. In order to constitute an acceptance of the congressional grant of right of way for public highways across public lands, there must be either user by the public for such a period of time and under such conditions as to establish a highway under the laws of this state, or there must be some positive act or acts on the part of the proper public authorities clearly manifesting an intent to accept such grant with respect to the particular highway in question. *Koloen v. Pilot Mound Twp.* 529.

INJURIES ON.

2. It is *held* that under the facts of the case it was contributory negligence for the plaintiff to step backwards into an open trench or ditch which was some 1½ feet deep and 1 foot 4 inches wide, and which lay about a foot outside of the sidewalk, and just inside the curb line, and at the corner of a street. *Jackson v. Jamestown*, 596.
3. A pedestrian upon the public streets of a city must use his senses, and not blindly walk or step backwards into a pit-fall, and, in walking upon such streets, he must make use of his faculties to discover danger and protect himself therefrom. He cannot rely so far on the presumption that the municipal authorities have done their duty and have kept the highway in a safe condition and in repair, as to go blindly forward without looking ahead and to take chances of getting along safely. His failure to notice obvious excavations in the sidewalk or at the edge thereof will be imputed to him as contributory negligence, unless his attention has been distracted in some other direction, not idly, but by some sufficient cause. *Jackson v. Jamestown*, 596.
4. The fact that a pedestrian's attention is diverted from an open and obvious

HIGHWAYS—continued.

danger will not excuse him from contributory negligence in stepping into the same, where such diversion of attention is self-induced and is caused by his talking to and joking with a friend. *Jackson v. Jamestown*, 596.

HUSBAND AND WIFE.**ALIENATION OF AFFECTIONS.**

Sufficiency of proof in action for, see Evidence, 21.

1. An action by a married woman against an unmarried woman for alienation of her husband's affections will lie even though plaintiff's husband has not completely and in a literal sense abandoned her. *Rott v. Goehring*, 413.
2. If through defendant's alleged wrongful acts the plaintiff's husband was induced and persuaded to deprive plaintiff of the conjugal affection and society which the marriage contract entitled her to enjoy, she has a right to recover for the injury thus inflicted. *Rott v. Goehring*, 413.
3. Section 4355, Comp. Laws 1913, which prescribes what is forbidden by the rights of personal relation, was not intended to prescribe the only rules of conduct as to the violation of the wife's conjugal rights. *Held*, further, following *King v. Hanson*, 13 N. D. 85, that subdivision 1 of said section gives to the wife the same protection as subdivision 2 gives to the husband. *Rott v. Goehring*, 413.
4. Defendant will not be exonerated from all liability merely because the plaintiff's husband may have been more blamable than defendant. *Rott v. Goehring*, 413.
5. The fact that plaintiff was estranged from her husband prior to his illicit relations with defendant will not defeat the action. *Rott v. Goehring*, 413.
6. Whether an action will lie by a married woman for criminal conversation, and also whether such a cause of action is alleged in the complaint, not decided for reasons stated. *Rott v. Goehring*, 413.

IMPROVEMENTS.

Public improvements, see Public Improvements.

INDICTMENT.

To a criminal information attempting to charge facts sufficient to constitute the crime of openly outraging public decency and injuring public morals, under § 10250, Comp. Laws 1913, a demurrer was interposed and overruled. After conviction, defendant appeals. *Held*: The demurrer should have been sustained, as the facts stated in the information are insufficient to constitute the crime attempted to be charged. *State v. Stevens*, 540.

INFORMATION.

Criminal information, *see* Indictment.

INJUNCTION.

Suit for, by minority stockholder, *see* Banks, 1.

INSOLVENCY.

As to bankruptcy, *see* Bankruptcy.

INSTRUCTIONS. *See* Trial.

INSURANCE.

Review of discretion as to amendment of pleadings in action on policy, *see* Appeal and Error, 15.

Delegation of power to insurance commissioner, *see* Constitutional Law, 1, 2.

Pleading in action on policy, *see* Pleading, 10.

SEVERABILITY.

1. Where a policy of insurance is written for a gross premium, but the insurer agrees to pay a certain amount in case of the destruction of a building by fire, and the policy contains a provision that books must be kept of purchases and sales, and such books must be kept in an iron safe, the policy is divisible in so far as such clause or condition is concerned, and such clause or condition will not be held to apply to the insurance upon the building itself. *Ennis v. Retail Merchants Asso. M. F. Ins. Co.*, 20.

WAIVER; ESTOPPEL.

2. Where an insurance company refuses to consider a claim for the loss of goods destroyed by fire, on the ground that the premium has not been paid, and on that ground alone, and at no time asks for formal proofs of loss or furnishes blanks therefore, it will not be permitted to interpose upon the trial, when sued for the loss, the defense that such formal proofs were not furnished as required by the policy. *Ennis v. Retail Merchants Asso. M. F. Ins. Co.*, 20.
3. The doctrine of waiver will not be extended so as to deprive a party of his defense, merely because he negligently or incautiously, when the claim

INSURANCE—continued.

is first presented, while denying his liability, omits to disclose the ground of his defense, or states another ground than that upon which he finally relies. There must, in addition, be evidence from which the jury would be justified in finding that with full knowledge of the facts there was an intention to abandon, or not to insist upon the particular defense afterward relied upon, or that it was purposely concealed under circumstances calculated to, and which actually did, mislead the other party to his injury. The mere fact, therefore, that an insurance company, during the negotiations between the parties after a loss, merely justifies its refusal to pay the claim on the ground that the premium was not paid, does not debar such insurance company from interposing a defense based upon proper pleadings, that the conditions of the policy in regard to the making of an inventory and of the keeping of books of account and the keeping of the same in an iron safe have been violated. *Ennis v. Retail Merchants Asso. M. F. Ins. Co.*, 20.

INTEREST.

As to usury, see *Usury*.

INTERSTATE COMMERCE. See *Commerce*.

JOINDER.

Of causes of action, see *Action or Suit*, 1.

JUDGMENT.

Review of discretion in denying relief from a default judgment, see *Appeal and Error*, 19.

On appeal, see *Appeal and Error*, 38–41.

Recovering back payment on illegal judgment, see *Assumpsit*.

Sufficiency of complaint in action for relief from, see *Pleading*, 8.

JURY.

Waiver of, see *Appeal and Error*, 9.

LANDLORD AND TENANT.

Rights in grain grown on leased property, see *Evidence*, 10; *Trover and Conversion*.

LAW OF PLACE. See Conflict of Laws.

LEGISLATURE.

Delegation of power by, see Constitutional Law, 1.

Relation of courts to, see Courts, 1, 2.

Enactment of statutes by, see Statutes.

LETTERS.

Admissibility in evidence, see Evidence, 7.

LIENS.

Estoppel to assert lien, see Estoppel, 2.

Thresher's lien, see also Replevin.

A lien statement is sufficient under § 6855, Comp. Laws, 1913, and sufficiently describes the person "for whom the threshing was done," which names the person with whom the contract was made and who had charge of the operations and of the land, even though his interest in a part of the land was joint. (Following *Dahlund v. Lorentzen*, 30 N. D. 275.)
Branthover v. Monarch Elev. Co., 454.

LIMITATION OF ACTIONS.

As to adverse possession, see Adverse Possession.

LOANS.

Usurious loan, see Usury.

LOCAL IMPROVEMENTS. See Public Improvements.

LOCAL LAW. See Statutes, 5.

LOCAL SELF GOVERNMENT. See Constitutional Law, 3.

MAIMING.

Of opponent by one assaulted, see Appeal and Error, 37.

MANDAMUS.

1. Mandamus refused and the proceedings dismissed, no costs to be taxed.
Fargo v. Gearey, 64.

MANDAMUS—continued.

2. Four light, heat, and power companies within Cass county in 1914 were locally assessed. Thereafter and on August 5, 1914, the State Tax Commission also filed purported assessments on said plants, and demanded that its assessment be taken without equalization by the county or state boards of equalization. The auditor, however, certified to the state board of equalization both assessments, those made locally and those filed by the Commission, which board ignored the Tax Commission's assessment, recertifying the assessments as locally assessed. Mandamus was brought to compel reinstatement by the county auditor of the Commission's assessment. The writ was denied by the district court, from which the state appeals. Subdiv. 14 of § 2088, Comp. Laws 1913, a portion of chapter 302, Sess. Laws 1911, creating the State Tax Commission and defining its powers and duties, declares that "it shall be the duty of the Commission and it shall have authority (subdiv. 14) to assess at their actual value all light, heat, and power companies doing business in the state." The Commission acted under this statute. The county auditor asserts said statute is unconstitutional and void because in operation, as here illustrated, it permits a deprivation of private property without due process of law, contrary to § 13 of our state Constitution and also art. 1 of the 14th Amendment to the United States Constitution.

Held:

The defendant, though but a ministerial officer and not personally interested in these assessments, must follow the law, and must, under his official oath, determine which assessment of the two is made pursuant to law, and may therefore interpose this defense that the statute is unconstitutional and void under which one of said two conflicting purported assessments is filed. State ex rel. Miller v. Leech, 513.

MARRIED WOMEN. See Husband and Wife.

MASTER.

Findings of, see References.

MECHANICS' LIENS.

Trial *de novo* on appeal, see Appeal and Error, 12.

MILEAGE.

Allowance of, to sheriff, see Sheriff.

MISTAKE.

Necessity of specially pleading, see Pleading, 12.

MORTGAGE.

Trial *de novo* on appeal in action to foreclose, see Appeal and Error, 13.

Quieting title on condition of payment of mortgage indebtedness, see Cloud on Title.

Usury in, see Conflict of Laws; Usury, 3, 5.

Of grain grown on leased property, see Trover, 5.

1. Where a first mortgage is foreclosed, and during the year of redemption which is allowed to the mortgagor, the holder of a fourth mortgage redeems from such sale, by paying the first mortgage debt, the owner of a second mortgage may, under the provisions of § 7755, Compiled Laws of 1913, in turn redeem from such fourth mortgagee and within sixty days of his redemption, even though after the expiration of the original year, and by paying to such fourth mortgagee the amount which he paid to redeem with interest and taxes and assessments paid by him with interest, but without paying to such subsequent encumbrancer the amount of his fourth mortgage. *Bank of Mowbray v. Kelland*, 382.
2. A partnership which as a superior lien holder and under the provisions of § 7755, Compiled Laws of 1913, seeks to redeem from a prior redemptioner but inferior lien holder who has redeemed during the year of redemption under the provisions of § 8085, Compiled Laws of 1913, is not estopped from so doing on account of the fact that prior to such event one of its members purchased the sheriff's certificate of sale which was issued on the foreclosure of the first mortgage and under which both redemptions are sought to be made. *Bank of Mowbray v. Kelland*, 382.

MUNICIPAL CORPORATIONS.

Establishment of fund for bonding of municipal officers, see Constitutional Law, 2, 7.

Public improvements by, in general, see Public Improvements.

NEGOTIABILITY.

Of bills and notes, see Bills and Notes, 1.

NEGOTIABLE INSTRUMENTS. See Bills and Notes.

NEW TRIAL.

When action is terminated so that court loses jurisdiction to hear motion for, see Action or Suit, 3.

Raising question for review on appeal by motion for, see Appeal and Error, 8.

Review of discretion as to, see Appeal and Error, 20.

NOTES. See Bills and Notes.

NOTICE.

Of trial, see Trial, 1.

OFFICERS.

Bond of, see Bonds.

Of county, see also Counties.

Mandamus to, see Mandamus.

As to sheriff, see Sheriff.

Action by Stark county to recover \$4,794 of county commissioners and former state's attorney Murtha and bondsmen of said officials, for paying that amount to said state's attorney, who received it for obtaining and collecting a judgment for \$9,589 against a former defaulting county auditor and his surety. *Held*: The complaint states a cause of action against the former officials as principals and against their sureties. Stark County v. Mischel, 432.

ORIGINAL JURISDICTION.

Of appellate court, see Courts, 3-5.

PARK COMMISSION.

Authority as to pavement of streets, see Public Improvements, 2-5.

PAROL EVIDENCE. See Evidence, 5, 6.

PAVEMENTS. See Public Improvements.

PAYMENT.

Recovering back payments, see Assumpsit.

33 N. D.—44.

PENALTY.

For exacting usurious interest, see Usury, 6-8.

PETITION.

Of plaintiff, see Pleading, 4-8.

PLEADING.

First raising questions of defects in, on appeal, see Appeal and Error, 22.

Waiver of objection to rulings on, see Appeal and Error, 26.

Allowing pleadings to be read in evidence or taken to jury room, see Trial, 2.

AMENDMENTS.

Appealability of order striking amended complaint from files see Appeal and Error, 1.

Discretion in granting amendment, see Appeal and Error, 14, 15.

1. The defendant is not entitled, as a matter of right, to amend his answer upon the trial so as to set up a new and added defense, and the trial court, under § 7482 of the Compiled Laws of 1913, is only authorized to grant permission to do so when such permission would be in furtherance of justice. *Ennis v. Retail Merchants Asso. M. F. Ins. Co.* 20.
2. It is error for a trial judge, after he has refused to allow the amendment of an answer upon the trial, in order that a certain defense may be interposed, and has thus lulled the plaintiff into a sense of security that no such defense can be relied upon, to afterwards, and after a verdict has been rendered in favor of the plaintiff and judgment has been entered thereon, to allow an amendment to the answer setting up such defense so that a judgment notwithstanding the verdict may be entered thereon. *Ennis v. Retail Merchants Asso. M. F. Ins. Co.* 20.
3. An amended complaint setting forth two causes of action, the first cause of action being new, and a departure from the original cause of action, and the second cause of action being substantially a repetition of the former complaint, which had been held bad on demurrer, is properly stricken out. *Bergen Twp. v. Nelson County*, 247.

DECLARATION OR COMPLAINT.

4. A complaint attacked by objection to the introduction of evidence will be liberally construed, and the pleading will be sustained if possible. *Erickson v. Wiper*, 193.

PLEADING—continued.

5. Where a complaint is assailed for the first time by a general objection upon the trial, every presumption will be indulged in favor of the pleading, and the pleading construed as sufficient, if it is reasonably possible to do so. *Morris v. Occident Elev. Co.* 447.
6. Where, in an action to recover a balance claimed to be due upon a book account, the plaintiff attaches to its complaint and makes a part thereof an account which begins on the 5th day of March, 1909, but, in proving his case and in his evidence in chief, proves the account as beginning at an earlier date, namely, the 14th day of August, 1908, and the point at issue in the case is whether a sale alleged to have been made prior to the 5th day of March, 1909, was actually made, and no permission has been asked to amend the complaint, and no amended answer has been requested, the issues will be presumed to be defined by the evidence, and the case will be treated as if the whole account had been sued upon and a general denial had been interposed. *Tolerton & W. Co. v. Sult*, 283.
7. Ordinarily damages cannot be awarded in an amount exceeding that alleged and demanded in the complaint. *Orfield v. Harney*, 568.
8. Where a party seeks the aid of equity in relieving against a judgment or determination of a court or tribunal on the ground of fraud, it is not sufficient to incorporate in the complaint a general allegation of fraud, but the specific facts constituting the alleged fraud must be set forth. *Bergen Twp. v. Nelson County*, 247.

PLEAS AND ANSWER.

9. Where a qualified general denial is filed in an action for the conversion of property, and such denial merely denies the allegations of the complaint, except "as hereinbefore are specifically and in words admitted," and prior to such denial there is to be found in the answer a plea of estoppel or waiver which admits the ownership of the grain, such ownership will be deemed to be conceded by such denial. *Branthover v. Monarch Elev. Co.* 454.
10. The defense that the insured had not made an inventory and kept books of his purchases and sales, and kept the same in an iron safe, as provided by the terms of his policy, is one which must be specially pleaded in an action upon such insurance policy. *Ennis v. Retail Merchants Asso. M. F. Ins. Co.* 20.
11. As a general rule the defense of estoppel by deed is not available unless pleaded, where the party seeking to assert such defense had an opportunity to plead it. *Erickson v. Wiper*, 193.
12. The rule that mistake must be specially pleaded does not apply where a person merely seeks to explain an apparent admission and to show his intention in making a payment. *Tolerton & W. Co. v. Sult*, 283.

PLEADING—continued.

REPLY.

13. Under the provisions of §§ 7467-7477 and 7452, Compiled Laws 1913, a plaintiff is not required to reply to new matter in an answer not constituting a counterclaim, except by order of the court; but every allegation of new matter in the answer, not constituting a counterclaim is deemed controverted by the plaintiff as upon a direct denial or avoidance by operation of law, and the plaintiff may introduce evidence of any fact tending to deny or avoid the new matter set forth in the answer. *Moore v. Tomlinson*, 638.

DEMURRER.

14. A demurrer to a complaint does not reach a failure to separately state causes of action. *Stark County v. Mischel*, 432.

POLICE POWER. See Constitutional Law, 7.

POSSESSION.

Adverse, see Adverse Possession.

Necessity of change of, to make sale valid, see Fraudulent Conveyances, 5, 6.

PREFERENCES.

By bankrupt, see Bankruptcy; Evidence, 3, 20.

PREJUDICE.

Change of venue because of, see Venue.

PREJUDICIAL ERROR. See Appeal and Error, 30-37.

PRESCRIPTION.

Title by, see Adverse Possession.

PRESUMPTIONS.

In general, see Evidence, 1, 2.

PRINCIPAL AND AGENT.

As to brokers, see *Brokers*.

Authority of carrier's agent, see *Carriers*, 1.

PRINCIPAL AND SURETY.

Joinder of causes of action against, see *Action or Suit*, 1.

PRIORITY.

Of claims against decedent, see *Executors and Administrators*, 1-3.

PROBATE COURT.

Appeal from order of, see *Appeal and Error*, 2.

PROOFS OF LOSS.

By insured, see *Insurance*, 2.

PUBLIC CORPORATIONS. See *Counties*.**PUBLIC DECENCY.**

Indictment for crime of outraging, see *Indictment*.

PUBLIC IMPROVEMENTS.

As to drains and sewers, see *Drains and Sewers*.

1. Special assessments were levied by the city, acting by its council, against Island Park, in Fargo, to reimburse for paving a street bordering upon said park. The city park commissioners refused to levy a tax to meet instalments of such special assessment falling due. From a judgment in mandamus directing such a tax levy the park commissioners appeal.

Held: The city council had no authority or jurisdiction to levy the special assessment or authorize the paving of the street bordering upon and adjacent to the city park. *Fargo v. Gearey*, 64.

2. The statutes grant sole and exclusive authority to the park commission to pave such streets and levy special assessments for resultant benefits. *Fargo v. Gearey*, 64.
3. Such an improvement to streets adjacent to the city parks is one within the declared purposes for furtherance of which exclusive control has been delegated by the legislature to the park commission. *Fargo v. Gearey*, 64.

PUBLIC IMPROVEMENTS—continued.

4. Power of the park commission to levy a special assessment against park property is not involved, and is not determined. *Fargo v. Gearey*, 64.
5. The park commissioners are directed to adopt and validate as far as possible the void acts of the city council in the authorization of the paving and especially assessing therefor that property so benefited may not escape assessment for such benefits; and the future procedure is suggested. *Fargo v. Gearey*, 64.

PUBLIC MONEYS.

Chapter 62, Laws 1915, does not contravene § 186 of the Constitution, which provides that no money shall be paid out of the state treasury except upon an appropriation by law, and on warrant drawn by the proper officers. *State ex rel. Linde v. Taylor*, 76.

PUBLIC POLICY.

As affecting contracts, see *Contracts*, 3.

PUBLIC SCHOOLS. See *Schools*.**QUANTUM MERUIT.**

Action by attorney to recover on, for services, see *Appeal and Error*, 32.

QUIA TIMET. See *Cloud on Title*.**QUIETING TITLE.** See *Cloud on Title*.**RATES.**

Of carriers, see *Carriers*.

REAL ESTATE AGENTS. See *Brokers*.**REAL PROPERTY.**

Mortgage on, see *Mortgage*.

Specific performance of contract as to, see *Specific Performance*.

RECORD.

On appeal, see *Appeal and Error*, 3-7.

REDEMPTION.

From mortgage, see **Mortgage**.

REFERENCE.

The findings of fact of a referee cannot be assailed for the first time in the appellate court. But the party dissatisfied with such findings must, in the first instance, present his objections thereto by proper exceptions in the court below. *Drinkwater v. Pake*, 190.

REMANDING.

Of record on appeal for amendment, see **Appeal and Error**, 6.

Of case by appellate court, see **Appeal and Error**, 38-40.

REPLEVIN.

1. Action in claim and delivery. Plaintiff demands possession of enough grain to satisfy a thresher's lien. Appellant argues three groups of errors which we cannot sustain, for the reasons stated below: An examination of the evidence discloses that defendant admitted that the grain was beyond his control. It was therefore not error to exclude further evidence of this admitted fact. *Houglum v. Browkowski*, 622.
2. It was not error to reject the thresher's lien when offered in evidence. The evidence disclosed that the grain in question could not be identified as having been grown upon the land covered by the lien. *Houglum v. Browkowski*, 622.
3. It was not error to reject plaintiff's offer to show that the lien was not intentionally erroneously drawn. *Houglum v. Browakowaki*, 622.

REPLY. See **Pleading**, 13.

RESCISSION.

Of contracts, see **Contracts**, 4.

RETAINING JURISDICTION.

By court of equity, see **Equity**.

REVERSIBLE ERROR. See **Appeal and Error**, 30-37.

SALE.

Burden of proof in action to recover for goods sold, see **Evidence**, 1, 2.

Sale as fraud on creditors, see **Fraudulent Conveyances**.

SCHOOLS.

Bond of school officer, see Bonds, 1-6.

Establishment of fund for bonding of school officers, see Constitutional Law, 2.

Two school districts of Cass county changed their boundaries. Arbitrators were appointed to equalize the property and debts. Their decision gave to plaintiff the sum of \$239.87. *Held*, that such arbitration was pursuant to §§ 1327-1331, Comp. Laws 1913, which provide that the arbitrators shall make a return of their findings to the county auditor, who shall thereupon extend a tax against the property situated within the districts to pay the various awards, and that the same shall be paid as the taxes are collected.

It, therefore, follows that the plaintiff could not maintain a suit in law upon the indebtedness. The remedy, if any, was by mandamus to compel the arbitrators, county auditor, and other officials to proceed with the collection of the tax. *School Dist. No. 94 v. Special School Dist. No. 33*, 353.

SEVERABILITY.

Of insurance contract, see Insurance, 1.

SHERIFF.

Construing § 3521 of the Compiled Laws of 1913, which provides that "in addition to the salary prescribed in the preceding section, the sheriff or his deputy or deputies shall be allowed ten cents per mile for each and every mile actually and necessarily traveled in the performance of their official duties," it is held that the 10 cents mileage belongs to the deputy, and not to the sheriff, where the work is done and the distance is actually and necessarily traveled, not by the sheriff, but by such deputy. *Scofield v. Wilcox*, 239.

SPECIAL ASSESSMENT. See Public Improvements.

SPECIFIC PERFORMANCE.

Trial *de novo* on appeal, see Appeal and Error, 11.

Retaining of jurisdiction in action for, see Equity.

1. It is presumed that the breach of an agreement to transfer real property cannot be adequately relieved by pecuniary compensation, and ordinarily a court of equity will enforce specific performance thereof. *Orfield v. Harney*, 568.
2. The vendee may be awarded specific performance of a contract to transfer real property, and damages against the vendor for delay in conveying, in the same action. *Orfield v. Harney*, 568.

STATE.

Public funds of, see Public Moneys.

STATE AUDITING BOARD.

Delegation of power to, see Constitutional Law, 1.

STATEMENT.

On appeal, see Appeal and Error, 5.

Of lien, see Liens.

STATUTE OF FRAUDS.

Invoking of statute of frauds for the first time on appeal, see Appeal and Error, 25.

In general, see Contracts, 1.

STATUTES.

Review of, by courts, see Courts, 1, 2.

Unconstitutionality of statute as defense in mandamus case, see Mandamus, 2.

CONSTRUCTION.

1. The object of all statutory interpretation and construction is to ascertain and give effect to the intention of the legislature. *State ex rel. Linde v. Taylor*, 76.
2. It is presumed that the legislature intended to enact a valid law, and, therefore, when a statute is susceptible of two constructions, one of which will render it valid and another which will render it unconstitutional and void, the former construction will be adopted. *State ex rel. Linde v. Taylor*, 76.

VALIDITY.

3. All constitutional inhibitions against the taking of private property without due process of law, and all constitutional guarantees of equal rights and privileges, are for the benefit of those persons only whose rights are affected, and cannot be taken advantage of by any other persons. *State ex rel. Linde v. Taylor*, 76.
4. The only test of the validity of an act regularly passed by a state legis-

STATUTES—continued.

- lature is whether it violates any of the express or implied restrictions of the state or Federal Constitutions. *State ex rel. Linde v. Taylor*, 76.
5. Chapter 62, Laws 1915, is not violative of § 11 of the State Constitution, which requires that all laws of a general nature shall have a uniform operation. *State ex rel. Linde v. Taylor*, 76.

STOCKHOLDERS.

In bank, action by, see *Banks*, 1.

SUPREME COURT.

Original jurisdiction of, see *Courts*, 3-5.

TAXES.

- Effect of payment of, to divest title, see *Adverse Possession*, 3.
- Due process of law in, see *Constitutional Law*, 4-6.
- Mandamus to tax officers, see *Mandamus*, 2.
1. Upon petition therefor of more than 25 per cent of the taxpayers of Ward county, filed in 1913, a levy was made in 1913 and 1914, under § 2263, Comp. Laws 1913, to promote diversified farming. In 1915 the board of county commissioners refused to levy a tax for such purposes upon the 1913 petition as a basis, claiming a further levy to be within the discretion of said board. Mandamus was brought, and from a writ directing a levy an appeal has been taken by the board.
Held: No discretion was vested in said board. Upon a valid petition filed "the board of county commissioners shall annually make an appropriation and levy a tax upon all taxable property of the county for the purpose of promoting diversified farming," quoting from the act, § 2263. Under this explicit direction an annual levy is required to be made, and the writ was properly issued. *Westlake v. Anderson*, 326.
 2. The legislature alone has power, by future legislation, to relieve from such future annual levy directed. Because no provisions for its discontinuance is made, it cannot be presumed that any discretion to discontinue the levy was vested in the board, contrary to the plain command of the statute that the board "shall annually make" a levy for said purposes. *Westlake v. Anderson*, 326.
 3. Said act constitutes no delegation of legislative power. The board acts only ministerially, and its only duty is to obey the statute. *Westlake v. Anderson*, 326.
 4. The State Tax Commission has no power under Comp. Laws 1913, § 2088.

TAXES—continued.

- subdiv. 14, which is void, to levy or file this assessment, and the same is therefore void. State ex rel. Miller v. Leech, 513.
5. Chapter 62, Laws 1915, does not require taxes to be levied and collected for other than public purposes, or authorize the taking of private property for private use without compensation. State ex rel. Linde v. Taylor, 76.
 6. Chapter 62, Laws 1915, does not contravene §§ 175, 176 or 179 of the State Constitution, relating to taxation and the expenditure of moneys raised by taxation. State ex rel. Linde v. Taylor, 76.

TERMINATION.

Of action, see Action or Suit, 3.

THRESHING.

Damages for breach of threshing contract, see Damages.
Lien for, see Estoppel, 2; Liens; Replevin, 1.

TORTS.

Joining cause of action *ex contractu* with one *ex delicto*, see Action or Suit, 1.

TRIAL.

Objectionable language of attorney, see Appeal and Error, 4, 34.

1. After service of notice of trial, the court during a subsequent term, after oral notice given plaintiff's attorney of an intention by defendants to so request, placed these causes upon the calendar for trial. Later upon peremptory call judgment was awarded against plaintiff for nonprosecution in his absence. No note of issue was ever filed. *Held*:
The court had jurisdiction under § 7610, Comp. Laws 1913, to so order, notice of trial having been seasonably served. Note of issue is required for convenience, and is not a jurisdictional prerequisite to trial or summary disposition of the action. *Pathman v. Williams*, 365.
2. Where facts and issues are admitted by the pleadings, the proper practice is for the court to instruct the jury as to the issues in the case and that such a fact has been admitted, rather than to allow the pleadings to be read in evidence to the jury or taken by them into the jury room. *Branthover v. Monarch Elev. Co.* 454.

SUFFICIENCY OF EVIDENCE TO GO TO JURY.

3. Suit for supervising and aiding in the sale of a building and for pre-

TRIAL—continued.

miums advanced by plaintiff upon insurance policies. Evidence examined and held sufficient to require the submission to the jury of the first cause of action, to wit, the \$500 services claimed by plaintiff to have been performed in looking after the building and aiding in effecting a sale. *Barkley v. Quick*, 124.

4. Evidence examined and held sufficient to require the submission to the jury of the second cause of action, to wit, the premiums advanced upon the insurance policies. *Barkley v. Quick*, 124.
5. Actions in conversion by mortgagee, plaintiff, for grain delivered elevator companies, defendants. W., owner of the land on which the grain was raised under a contract with his tenant B., intervenes, asserting that title to the grain had never passed to the tenant, and that plaintiff's mortgage had never attached, and that intervenor was entitled to said grain to satisfy his alleged claims against his tenant. The cropping contract was in the usual form, stipulating title as remaining in the landlord until after a division and delivery of the crop or its proceeds, and empowering the landlord to retain the crop or any portion thereof for any indebtedness due him from the tenant. A physical division of the grain into equal parts at the threshing machine was proven; also, that the portions were placed in different bins; that the tenant was permitted to hold his portion and store the same in his own name, understanding the same to be his share; that the landlord knew all this, made no objection, and took no steps for six weeks after threshing, and until long after marketing, to assert any claim to the tenant's portion; that meanwhile the tenant had hauled to market the landlord's portion, at his request, and as the landlord's share and in compliance with the contract; that the tenant had paid his portion of the thresh bill and performed all conditions of the contract, except one in which he was prevented during the summer by the landlord from completing; that the crop in question was raised the first year of a three years' cropping agreement; that no formal settlement of accounts had been had or was had, although the tenant was released from further performance of the contract by the landlord the following spring; that there was a mutual account between the parties unsettled. The court permitted the landlord to show the full amount of his account against the tenant, but excluded proof offered by the plaintiff from the tenant that the landlord owed more than the latter owed the landlord, and that in fact the landlord had no charge or lien upon the grain at the time it was delivered at the threshing machine to the tenant and by him subsequently marketed.
Held: The facts were sufficient to authorize submission to the jury of whether a division and delivery with intent to vest title in the tenant had been made; and the fact that a settlement of mutual accounts between the

TRIAL—continued.

landlord and tenant had not been made is not necessarily controlling.
State Bk. v. Hurley Farmers Elev. Co. 272.

DIRECTION OF VERDICT.

Raising question for review on appeal by motion for directed verdict, see Appeal and Error, 8.

Review of ruling on motion for nonsuit or directed verdict, see Appeal and Error, 21.

6. Error cannot be predicated upon a refusal to direct a verdict at the close of plaintiff's case, when testimony is thereafter offered by defendant, unless the motion is renewed at the close of all the testimony. Halverson v. Lasell, 613.
7. It is *held*, for reasons stated in the opinion, that defendant's motion for a directed verdict was properly denied. Erickson v. Wiper, 193.
8. In an action in conversion of grain and under issues as here framed by the pleadings, the landlord can recover only to the amount that will suffice to completely indemnify him from actual injury. It was therefore necessary to determine the validity and amount of his alleged claim and lien, and plaintiff was entitled to have the foregoing questions submitted to the jury, and the direction of a verdict against plaintiff after the proof made was error. State Bk. v. Hurley Farmers Elev. Co. 272.
9. The court properly denied motion to direct a verdict upon two items mentioned in the complaint. The evidence of the plaintiff, if true, would merely show that those particular funds belonged to her husband. This would not justify a verdict in her favor. Boelter v. Christ, 331.

INSTRUCTIONS.

Prejudicial error as to instructions, see Appeal and Error, 35-37.

10. Certain instructions of the court set out in the opinion are without error. Barkley v. Quick, 124.
11. Suit for commission for furnishing purchaser for real estate, the terms of the listing contract being in dispute. Instructions of the court examined and found correct in all particulars excepting the part which instructs the jury that the signing of exhibit "A" settled the controversy relative to the amount of the commission. For reasons stated in the opinion, this is error which necessitates a new trial. Paulson v. Reeds, 141.
12. Where an instruction is correct as far as it goes, error cannot be assigned on the ground that it was not sufficiently full and explicit unless request is made for more specific and comprehensive instruction. Buchanan v. Occident Elev. Co. 346.

TRIAL—continued.

13. Where an instruction is correct as far as it goes, error cannot be assigned on the ground that it is not sufficiently full or explicit, unless request is made for more specific and comprehensive instruction. *Halverson v. Lasell*, 613.

TRIAL DE NOVO.

On appeal, see Appeal and Error, 9-13.

TROVER AND CONVERSION.

Pleading in action for, see Pleading, 9.

Sufficiency of evidence to go to jury, see Trial, 5.

A plaintiff makes out a prima facie case in an action for the conversion of grain upon which it holds a chattel mortgage, by showing that its mortgage covers the half interest of the mortgagor in grain grown upon a certain tract of land; that the mortgage was on record, and that all of the grain raised on said land was sold to the elevator company by the tenant and mortgagor, that it was raised on said land by the mortgagor, and that said mortgagor was farming and in possession of the premises, and this without actually introducing in evidence the lease, if any, under which the tenant held. *Chaffee Bros. Co. v. Powers Elev. Co.* 550.

USURY.

Conflict of laws as to, see Conflict of Laws.

Construction of usury statutes, see Courts, 6.

1. The test of usury under the laws of Minnesota is, "Will the contract, if performed, result in producing to the lender a rate of interest greater than is allowed by law, and was that result intended?" *Gold-Stabeck Loan & C. Co. v. Kinney*, 495.
2. When, under the laws of Minnesota, "an agreement" exacts from the borrower a bonus to be paid to the lender for making the loan, that bonus, on the question of usury, must be taken out as of the date when it is to be paid by the terms of the agreement. If payable at the time of advancing the loan, it is for the purpose of determining what rate of interest the agreement reserves to the lender, to be deducted as of that date from the amount of loan nominally agreed upon, and the computations of interest made on the remainder. *Gold-Stabeck Loan & C. Co. v. Kinney*, 495.
3. Contract of mortgage loan examined and held to be usurious and therefore void under §§ 2733 and 2735, Revised Laws of Minnesota. *Gold-Stabeck Loan & C. Co. v. Kinney*, 495.

USURY—continued.

4. In order to avoid a contract under the laws of Minnesota, it is not necessary that there should be proof of an actual intent to evade the usury laws, but the rule may be applied that one is presumed to intend the necessary consequences of his acts. *Gold-Stabeck Loan & C. Co. v. Kinney*, 495.
5. Suit to foreclose a mortgage securing notes for \$4,000 bearing interest at 12 per cent, nonusurious on their face. In part these two notes were renewals of two prior notes of \$356 and \$966 with cash advanced sufficient to aggregate \$4,000 for which the two notes were taken with security as one transaction. The \$356 note contained a usurious charge of bonus of \$45, and drew 12 per cent interest. No deduction for or purging of said usury was made by the parties when the \$4,000 in notes were taken, but the usurious amount was included in them. Defendant pleads usury, and demands that all the interest on the \$4,000 be forfeited and remitted under the usury statute. The trial court deducted the interest on and bonus in the \$356 note, but allowed interest on the balance of the \$4,000. *Held*:—The principal of two notes aggregating \$4,000 is tainted with usury through that contained in the \$356 note entering into them as a portion of the purported principal of said notes. *Person v. Mattson*, 49.
6. The usury statute, § 6076, Comp. Laws 1913, providing that the taking of usury "shall be deemed a forfeiture of the entire interest which the note, bill, or other evidence of debt carries with it or which has been agreed to be paid thereon," mandatorily requires the penalizing of usury and the forfeiture of all the interest "agreed to be paid" on these two notes. *Person v. Mattson*, 49.
7. All usurious interest stipulated for should be forfeited. The usurious contract rate cannot be treated as invalid and not a contract for an interest rate, and interest at the noncontract rate of 6 per cent be allowed. To do so would be to ignore and override the statutory penalty requiring forfeiture of all interest "agreed to be paid" on the notes. *Person v. Mattson*, 49.
8. A court of equity should not relieve the usurer from the results of his contract for usury, but should enforce the statutory penalty for *exacting usury*. *Person v. Mattson*, 49.
9. With usury proved in a note sued upon, a court cannot and should not separate the nonusurious from the usurious transactions incorporated by renewal into an usurious note, so as to allow interest on the nonusurious portion. *Person v. Mattson*, 49.
10. The parties to an usurious contract themselves by agreement may purge it of usury, but a court of law or equity cannot do so after suit brought and after a defense of usury is interposed. *Person v. Mattson*, 49.

USURY—continued.

WHO MAY RAISE DEFENSE OF USURY.

11. Though usury is usually a personal defense and can only be pleaded by the borrower or one in privity with him, yet the purchaser of property charged with a usurious lien, who pays his grantor the full purchase price without deducting therefrom the amount of said lien or in any way assuming its payment, may interpose the defense of usury in an action to enforce such lien, and in such case will be deemed to stand in privity of contract and estate with the mortgagor. *Gold-Stabeck Loan & C. Co. v. Kinney*, 495.

VENDOR AND PURCHASER.

Specific performance of contract, see *Specific Performance*.

VENUE.

Review on appeal of discretion as to change of, see *Appeal and Error*, 18.

The fact that a number of persons in any part of the county have a bias or prejudice against the defendant in a civil action will not justify a change of venue against the objections of the adverse party, if, notwithstanding the bias and objection of such persons, a fair and impartial trial can be had in that county. *Booren v. McWilliams*, 339.

WAIVER.

Of jury, see *Appeal and Error*, 9.

Of error in trial court, see *Appeal and Error*, 26, 29.

By insurance company, see *Insurance*, 2, 3.

WILLS.

Testamentary character of instrument, see *Bills and Notes*, 2.

Matters concerning executors and administrators, see *Executors and Administrators*.

WITNESSES.

Cure of error in striking out answer of witness, see *Appeal and Error*, 27.

WITNESSES—continued.

Cure of error in sustaining objection to witness, see Appeal and Error, 28.

Prejudicial error as to, see Appeal and Error, 31.

1. It was error to ask the defendant whether he had not attempted to have plaintiff arrested for sending him a dunning letter, without first giving the witness a chance to admit his bias and prejudice against the plaintiff. *Paulson v. Reeds*, 141.
2. Where new matter is brought out on cross-examination of a witness, the adverse party is entitled to re-examine the witness regarding such new matter. *Erickson v. Wiper*, 193.
3. Error was committed by the trial judge in refusing to permit further cross-examination, under chapter 4 of the Laws of 1907, of one who was claimed to be managing agent of a railway company, on the ground that the court could not see that the plaintiff could show such person to be a managing agent, after such witness had testified that he had been in the employ of the defendant company for twenty-one years, that during such time he had been operator, station agent, train master, live stock agent, freight-transfer agent, assistant superintendent, and general agent; that at the time of the trial he was general agent of the company and as such general agent had charge of the business of soliciting freight up and down the line of the company, and solicited the freight from the plaintiff during the times covered by the suit, and also that he had taken part in trying to get a settlement for the plaintiff. *Knapp v. Minneapolis, St. P. & S. Ste. M. R. Co.* 291.

WRIT OF ERROR. See Appeal and Error.

33 N. D.—45.

Er 1/23/17.
A. G. C.

